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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No.

ASSOCIATED DRY GOODS CORPORATION,
Petitioner,

v.

THE COMMISSIONER OF REVENUE OF THE STATE OF MINNESOTA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

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June 18, 1984

QUESTIONS PRESENTED

1. Whether the Minnesota Supreme Court has decided a substantial federal question before it so as to conflict with applicable decisions of this Court, particularly *F.W. Woolworth Co.* v. *Taxation and Revenue Department*, 458 U.S. 354 (1982), *reh'g denied*, 103 S. Ct. 274 (1982), which applied the unitary business principle to a horizontal retail business.

2. Whether state courts persist in misinterpreting the unitary business concept as it applies to tax cases, contrary to the recent decisions of this Court.

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Associated Dry Goods Corporation ("Associated Dry Goods") respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of Minnesota entered in this proceeding on March 23, 1984.[1]

OPINION BELOW

The opinion of the Supreme Court of the State of Minnesota in *Commissioner of Revenue* v. *Associated Dry Goods Corp.* is reported at 347 N.W.2d 36 (Minn. 1984). A copy of the opinion appears in the Appendix hereto (hereinafter referred to as "App.") as App. A, pp. 1a-11a.

JURISDICTION

The judgment of the Supreme Court of the State of Minnesota was filed on March 23, 1984, and this petition for certiorari is being filed within ninety (90) days of that date.[2] This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3)(1948).

STATUTORY PROVISIONS INVOLVED

The following statutory provisions are set forth in the Appendix: Minn. Stat. § 290.17(4); § 290.19, Subd. 1,(2)(a). App. F, pp. 40a-41a.

STATEMENT OF THE CASE

I. Powers Dry Goods Company is a separate department store division of Associated Dry Goods Corporation and generates and receives income solely in the State of Minnesota.

Powers Dry Goods Company ("Powers") is a separate department store business with its principal store in Minneapolis and operates solely in the State of Minnesota. It is a division of Associated Dry Goods Corporation, a Virginia corporation qualified to do business in Minnesota.

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[1] The court below had jurisdiction of this case under Minn. Stat. § 271.10, Subd. 1, which provides the Supreme Court of the State of Minnesota with jurisdiction to review judgments of the Minnesota Tax Court.

[2] The existence of a right to petition the Minnesota Supreme Court for rehearing does not prevent its judgment from becoming final for purposes of immediately petitioning to the United States Supreme Court. *Southern R.R.* v. *Clift*, 260 U.S. 316 (1922).

Powers was founded by local Minneapolis residents in 1881 and operated separately for many years as an independently owned business. In 1916 it became a separate operating subsidiary of Associated Dry Goods Corporation. Powers and the other retail companies in Associated Dry Goods' group remained as subsidiaries of Associated Dry Goods until 1951, when Associated Dry Goods was reorganized to enable it to improve its capital structure and to facilitate financing programs. After the reorganization, all the subsidiaries were merged into one corporation and became divisions of Associated Dry Goods rather than subsidiary corporations. They retained, nonetheless, their characteristics as local autonomous businesses.

Powers is a separate department store operation. It purchases its own merchandise from suppliers. It decides which kind of merchandise to buy. It decides whether to buy hard goods or soft goods. It decides on quantity and quality.

The purchase price of the goods it buys becomes the cost basis of the merchandise on its books. When it sells at prices determined by it, its markup is the difference between its cost basis and its sale price. The basis of taxation, i.e., income, is derived precisely from this totally local process just described.

The operation of Associated Dry Goods is distinguished from a chain store operation which purchases on a corporate-wide basis from a centrally operated buying department which then assigns the cost basis of centrally purchased goods on an allocated basis to local stores and also sets the price of sale thus creating a non-locally derived profit. In the Associated Dry Goods situation, precisely the reverse is true. Purchases, cost basis and sales price, the fundamental basis of income determinations, are not only locally determined but locally derived.

All of the attributes of merchandising, i.e., wholesale purchasing, retail selling, cost basis determinations, promotional activity, such as sales, discounts, and advertising, are completely determined by Powers.

The business is operated under the name of Powers Dry Goods Company and the community, customers and employees hardly are aware of the existence of Associated Dry Goods. In view of its long local identity, the name of Powers is a household word in Minnesota. Charge accounts, bills and correspondence are all carried out under the name of Powers.

Powers does its own accounting, has its own local banks and legal counsel. On pages 10-11 infra, the indices of separateness *as found by the Minnesota Court* are set forth. Corporate functions as distinguished from merchandising and business are performed by Associated Dry Goods with a minimal office staff in New York City. At the time in question, the aggregate number of employees of the divisions of Associated Dry Goods was 57,500, all of whom were divisional employees. In contrast 167 employees worked in the New York office of Associated Dry Goods to provide the stewardship oversight of an owner of his properties. Such 1/344 ratio in itself demonstrates the impossibility of a unitary operation; and the only possible way for such a vast operation to function with such a minimal New York staff is through local autonomy and responsibility.

Division presidents, such as the president of Powers, have total authority over hiring, training and firing of personnel. Working rules are prescribed locally. Day to day control of the business resides in the Powers management.

The New York office acts as counselor and information gatherer and disseminater to the divisions. It performs limited corporate services, such as administration of a common pension plan and a common casualty insurance policy. It also serves as the source of funds for capital projects.

II. The Minnesota Supreme Court found Associated Dry Goods to be a unitary business for tax purposes.

For the tax years at issue, February 1, 1967 through January 31, 1976, Powers filed Minnesota state income tax returns, reporting on a separate accounting basis only income generated and received by the Powers division. On May 17, 1977, the Commissioner of Revenue assessed additional state income taxes for these years in the aggregate amount of $280,085.06. App. E, pp. 38a-39a. If a business is carried on partly within and partly without the state of Minnesota, then Minn. Stat. § 290.19, App. F, pp. 40a-41a, provides that the entire income derived from the business shall be considered in determining the business' state income tax under a three-factor apportionment formula. This formula apportions income on the basis of a percentage representing the arithmetic average of the ratios of sales, property, and payroll within Minnesota to the sales, property, and payroll of the business as a whole. The

Commissioner applied this formula to arrive at his additional assessment.

The assessment was appealed by Associated Dry Goods to the Minnesota Tax Court. In its Notice of Appeal, Associated Dry Goods asserted that the Commissioner's method of allocating taxable income was contrary to the Due Process clause of the Fourteenth Amendment to the United States Constitution. On November 2, 1982, the Tax Court affirmed the Commissioner's order, finding that the taxpayer was a "unitary business" for the years in question and that its income was properly apportioned by the three-factor formula of Minn. Stat. § 290.19, Subd. 1(2). App. B, p. 26a.

By Writ of Certiorari, dated February 17, 1983, the matter came to the Minnesota Supreme Court. In its Petition for Writ and in its Brief, Associated Dry Goods argued that the Commissioner's order pursuant to the Minnesota statutes at issue violated the Due Process clause of the Fourteenth Amendment to the United States Constitution. This argument was rejected, and the Tax Court's determination was affirmed.

The Minnesota Supreme Court found that this case was similar to *F.W. Woolworth Co.* v. *Taxation and Revenue Department*, 458 U.S. 354 (1982). App. A, p. 9a. However, it decided the case on the basis of *Container Corp.* v. *Franchise Tax Board*, 103 S. Ct. 2933 (1983), *reh'g denied*, 104 S. Ct. 265 (1983).

REASONS FOR GRANTING THE WRIT

I. The Supreme Court of Minnesota has decided a federal question in a way in conflict with applicable decisions of this Court.

The basis for this petition is that the Minnesota Supreme Court has decided a substantial federal question before it[3] in a way "in conflict with applicable decisions of this Court,"[4] in particular,

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[3] "The Due Process and Commerce Clauses of the Constitution do not allow a state to tax income arising out of interstate activities—even on a proportional basis unless there is a 'minimal connection' or 'nexus' between the interstate activities and the taxing state, and 'a rational relationship between the income attributed to the state and the intrastate values of the enterprise.'" *Exxon Corp.* v. *Wis. Dep't of Revenue*, 447 U.S. 207, 219-220 (1980), quoting *Mobil Oil Corp.* v. *Commissioner of Taxes*, 445 U.S. 425, 436-37 (1980).

[4] Sup. Ct. R. 17.1(c) (1980).

Mobil Oil Corp. v. *Commissioner of Taxes*, 445 U.S. 425 (1980), and *F.W. Woolworth Co.* v. *Taxation and Revenue Department*, 458 U.S. 354. Each of these decisions makes clear that the question of whether a multistate business enterprise constitutes one "unitary business" or several discrete businesses depends upon "the underlying activity" and "functional realities" of the business operations, *per se*, rather than the form in which the organization is structured or the fact that the owner may pursue various activities in stewardship of his investment.

The decision of the Supreme Court of Minnesota is particularly grievous because that court indicated that it was relying upon *Container Corp.* v. *Franchise Tax Board*, 103 S. Ct. 2933, rather than the *Woolworth* case. The Supreme Court of Minnesota stated: "[W]hile our case has similarities to *Woolworth*, there are also differences. Indeed, we think the facts of this case are much closer to *Container Corp.*" App. A, p. 9a.

In view of the fact that the *Woolworth* case is practically "on all fours" with the present case, the decision of the Court below is incomprehensible and is a clear misapplication of a precedent of this Court.

Woolworth dealt with a non-integrated horizontal retail business; Associated Dry Goods is a non-integrated horizontal retail ownership group. *Container Corp.*, on the other hand, dealt with a vertically integrated manufacturing business. It is implicit in such an integrated manufacturing business that the functional operating steps are unitary. On the contrary, in a retail ownership group, such as Associated, the purpose and functional consequence of the structure is to be diverse.

The following table demonstrates the parallelism of the *Woolworth* case with the present case and the functional non-unitariness of Associated Dry Goods:

Woolworth	*Associated Dry Goods*
Business	
Retailing: the purchase of goods for resale to final consumers. 458 U.S. 354, 364.	Same.
Significantly different from the "'highly integrated' business of locating, processing and marketing a resource." *Id.*	Same.
Site Selection	
Local. *Id.* at 365.	Same.
Advertising	
Local. *Id.*	Same.
Operation	
"[F]unctions autonomously and independently of the parent company." *Id.* "[E]ach subsidiary operated as a distinct business enterprise at the level of full-time management." *Id.* at 366.	Same for each division.
Accounting	
Each subsidiary has a complete accounting department and a financial staff. *Id.* at 365.	Same for each division.
Legal Advice	
Each subsidiary has own outside counsel. *Id.*	Same for each division.
Personnel Training Programs	
No central personnel training. *Id.*	Same.
"The subsidiaries proceed with their own programs either formal or informal. They develop their own managers and instruct them in their methods of operations." *Id.* at 367.	Same for each division.

Woolworth	*Associated Dry Goods*
Retailing	
Each subsidiary is responsible for determining the market conditions in their own territory and the mix of items to be sold. The German subsidiary emphasizes soft goods such as dresses and coats. It sells no food. The English subsidiary operates restaurants in its stores and also operates supermarkets. Each subsidiary attempts to cater to local tastes and needs. The inventory of each subsidiary consists, in large part, of home-country produced items. This purchase-at-home practice is consistent with the policy of the taxpayer. A number of inventory items are purchased from the Orient or other places but there is no evidence that the subsidiaries purchase or are required to purchase inventory items from any particular source. *Id.*	Associated Dry Goods is less unitary than Woolworth. Each division is a separate business with a separate name. Each division is responsible for determining market conditions in its own territory and the mix of merchandise to be sold in that market. For example, some divisions sell major appliances, others do not; some sell food, others do not. There is a vast difference between Associated divisions. Thus, the Lord & Taylor specialty division emphasizes merchandise where fashion is an important consideration; while Caldor, a recently acquired separately operating discount chain, features quality discount merchandise. More recently, Associated Dry Goods has acquired Loehmann's, a chain of off-price apparel stores, whose merchandising differs radically from the other divisions' retail philosophy and practices. Each division makes its own decisions as to the merchandise it purchases. Inventory is not purchased from any particular source.
Name	
The Woolworth name is used throughout.	Divisions use local names, historically derived.
History	
Woolworth stores established by Woolworth as Woolworth stores.	Division stores are indigenous to each area. Each division (except Robinson's of Florida) was locally formed by local people; subsequently acquired by Associated Dry Goods and the local identity retained.

Woolworth	*Associated Dry Goods*
Management	
"Some managerial links." *Id.* at 368.	Some managerial links, exchange of information, and intracompany travel by executives.
"There is a substantial exchange of business information, a teletype communication system and travel back and forth of executive personnel between the parent and its affiliates. Any substantial borrowing or other major decision requires approval of Woolworth. There is some flow back and forth of goods and financial resources. Management responsibilities are given to the foreign corporations only commensurate with the development of their abilities to act independently of the parent. In the past Woolworth has furnished investment capital and has made loans to its subsidiaries. . . ." *Taxation and Revenue Department* v. *F. W. Woolworth Co.*, 95 N.M. 519, 624 P.2d 28, 33 (1981).	Generally, communication is much less than in Woolworth situation.
Any substantial borrowings by a subsidiary would require permission from the parent company. 458 U.S. at 369, n. 21.	Any substantial borrowing or financial transactions by a division requires approval of Associated Dry Goods.
	Associated Dry Goods furnishes capital for new stores and capital improvements.
Inter-Company Activity	
There were not "any intercompany sales of inventory." *Id.* at 365, n. 13.	There are no interdivision sales of inventory.
Credit Card Systems, Etc.	
No uniform credit card systems, no uniform brand names, no uniform promotional displays, all run from the national headquarters.	There is no companywide credit card system, no uniform purchasing, no uniform brand names, no uniform promotional displays.

Thus, in *Woolworth* this Court held that the form of ownership, the regular exchange of information, the occasional personal contacts occurring "from time to time" between corporate headquarters

and the foreign offices, and the "oversight" of capital structure and major debt did not, either alone or in combination, cause the entire organization to be unitary. In contradiction to the foregoing, the Minnesota Supreme Court turned its decision on the following equally irrelevant characteristics:

(1) "[there was] one set of stockholders, officers and directors";

(2) there was
(a) "sharing of information",
(b) "some group buying", and
(c) "periodic reports and conferences";

(3) "preparation of tax returns at the corporate level";

(4) "one pension plan";

(5) "centralized purchasing of casualty insurance";

(6) "various consultant services" [at the corporate level]; and

(7) "funds are commingled and used to fund capital improvements and for loans back to store divisions."[5]

App. A, p. 9a-10a.

Against the foregoing meager list, it is instructive to examine the functional realities of Associated Dry Goods' operations which were expressly mentioned by the Minnesota Supreme Court in its opinion.[6]

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[5] In *Woolworth* this Court rejected the conclusion of the New Mexico Supreme Court that: ". . . the placing of the [dividend] money in [Woolworth's] general operating account . . . point(s) to functional integration and reveal(s) an underlying unitary business." 458 U.S. at 361. The Court referred to this as a departure from the appropriate legal standard upon which to judge the unitary issue—*i.e.*, the underlying economic realities.

The Minnesota Supreme Court has used the same inappropriate legal standard. In turning its decision, in part, on the fact that "funds are commingled" is not the Minnesota Supreme Court, as did the New Mexico Court, "trivializing" the Due Process clause by holding it satisfied simply because the income in question "adds to the riches of the corporation. . . ." *Wallace* v. *Hines*, 253 U.S. 66, 70 (1920). This Court said in *Woolworth*: "Income, from whatever source, always is a business advantage to a corporation. Our cases demand more." 458 U.S. at 363.

[6] See table above at pp. 6-8, showing detailed comparison between the determinative facts of *Woolworth* and those proven in the case at bar. The Minnesota Supreme Court, however, essentially ignored *Woolworth* and looked to *Container Corp.* as authority for its decision.

(1) Associated Dry Goods "operates as a retail ownership group."

(2) Associated Dry Goods stores "are set up as separate divisions."

(3) "Although they are not corporate subsidiaries, neither are they chain stores."

(4) "Each division . . . is operated independently."

(5) Each division caters "to different sections of society."

(6) Each division "carries different merchandise lines."

(7) Each division "uses different methods of operation."

(8) "Almost all day-to-day control over operations and management is delegated to the division officers."

(9) "Division presidents . . . are given nearly total authority over

(a) hiring, (b) firing, (c) merchandising, (d) warehousing, (e) pricing, (f) sales advertising and (g) store layout . . ."

(10) While division presidents and treasurers may also be officers of Associated Dry Goods, the appointments "are mostly honorary" and "the signatory authority is rarely exercised."

(11) "Corporate officers dictate few corporate policies."[7]

(12) "Most [corporate policies] are advisory only."

(13) "Health insurance is purchased locally" by the divisions.

(14) "Divisions do very little group purchasing, less than 10 percent of total purchases."

(15) *"Each division is set up to operate as a separate business."* (Emphasis added.)

(16) "Most decisions regarding expansion or renovation of stores are made and planned at the division level."

(17) "All of the stores of the Powers Dry Goods Co. division are in Minnesota."

(18) "The stores are designed to compete effectively in the local market (as opposed to competing with national chain stores)."

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[7] The minimal centralized activities by Associated Dry Goods and the substantial autonomy of each division are illustrated by the fact that during a seventeen year period only twenty-three "policy memoranda" were issued by the New York office. App. G, pp. 42a-44a.

(19) "Powers makes its own purchases."

(20) "[Powers] trains its own employees."

(21) "[Powers] owns its fixtures, equipment and delivery fleet."

(22) "[Powers] does its own accounting."

(23) "[Powers] has its own local banks and legal counsel."

(24) "[Powers] does its own advertising."

(25) *"[Powers] receives all of its income from the sales at its stores—i.e., it receives no income from other Associated Dry Goods divisions or subsidiaries."* (Emphasis added.)

App. A, pp. 6a-8a.

It is important to note that *Woolworth* is the first case involving a retailer in which this Court dealt with the unitary business principle.[8] In *Woolworth*, this Court stated that retailing is a type of business which "differs significantly" from the types of businesses which it had previously had occasion to examine relative to the unitary business issue. Yet, as stated above, the Minnesota Supreme Court, for its ultimate authority, looked not to *Woolworth*, but rather to *Container Corp*.[9]

The interrelationships which may exist among the activities of any large business enterprise, whether conducted through subsidiary corporations or, as here, divisions, are subtle and often difficult to discern and articulate. Is not the task of comparison made even more difficult, and error prone, if the Court looks to cases involving different rather than similar types of businesses? The comparison of

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[8] The Minnesota Supreme Court mistakenly puts *Butler Brothers* v. *McColgan*, 315 U.S. 501 (1942) in the retailer category. Butler Brothers was engaged in wholesaling.

[9] The Minnesota Supreme Court said: ". . . [W]hile our case has similarities to *Woolworth*, there are also differences. Indeed, we think the facts of this case are much closer to *Container Corp*.." However, the Minnesota Supreme Court's reasoning is contrary to this Court's explicit distinguishing of *Container Corp*. from *Woolworth*. In *Container Corp*., after setting forth the several reasons for its holding, this Court commented: "In each of these respects, this case *differs* from . . . *F.W. Woolworth* and *clearly* comes closer than [it] did to presenting a 'functionally integrated enterprise.' " (Emphasis added.) 103 S. Ct. at 2947-48. If this statement be true, then the Minnesota Supreme Court is surely wrong in its view of the matter.

the facts in *Woolworth* with the facts proven in the case at bar, shown above at pages 6-8, is the more readily made because in each case we are speaking the language of retailing. No similar chart, whether drawing parallels or opposites, can as easily be constructed to compare the facts in *Container Corp.* with the facts in the case at bar.

Petitioner is not requesting this Court to act as a court of first instance merely to re-examine the findings of the Minnesota Supreme Court. The four or five facts upon which the Minnesota Supreme Court based its decision are supported by evidence. That does not mean, however, that these few points are properly dispositive of the issue. On the contrary, they connote a legal standard quite unrelated to the "functional realities", and "underlying activity" of the several Associated Dry Goods divisions.

An examination of the entire record will show that the result of the decision below violates Petitioner's constitutional rights. In such case, this Court has the power to arrive at an independent judgment on the issue. *Norton Co.* v. *Department of Revenue*, 340 U.S. 534, 537-38 (1951). Petitioner respectfully requests that a Writ of Certiorari issue to this end.

II. An important federal question is presented because, notwithstanding the recent decisions of this Court, state courts persist in misinterpreting the unitary concept as it applies to tax cases.

Petitioner has had substantial experience in a number of the states in which it does business which indicates clearly that state taxing authorities make virtually no analysis of the underlying economic realities of a business before adopting an apportionment posture in assessment of taxes. The taxing authorities simply consider separate accounting or apportionment and apply whichever method supplies them with the greatest tax revenues. Indeed this approach has been explicitly stated in a number of public records including oral argument before this court. App. H and I, pp. 45a-48a. As a result there is in practice a singular disregard of the constitutional rights of persons doing business in several states.

The citizen is thus put in the difficult position of having to protect his rights through costly appeals to the federal judiciary rather than being able to rely upon the reasonable expectation that local government will refrain from violating his rights by taking actions without appropriate, and constitutionally required, inquiry. In order to rec-

tify this situation, it is incumbent upon this Court to redefine the unitary concept with greater accuracy.

The first premise which must be established is that these cases involve the imposition of taxes and that the imposition of taxes is a function of income. Secondly, these cases are *tax* cases, not cases in corporate organization. They are not cases which deal with the myriad facets of methods and procedures pertaining to complex corporate operations as such. The processes and procedures for managing corporations and the literature pertaining thereto are manifold beyond belief, but these are concerns for corporate law, securities law and, perhaps, antitrust law. They are not of concern for tax law.

In a tax case, it is not sufficient merely to itemize individual corporate characteristics, such as the existence of a single pension plan or centralized purchasing of casualty insurance, and conclude that the existence of these characteristics is sufficient to justify a finding of unitariness for tax purposes. The state courts must undertake the burden of examining functional realities relating to the production of income and the flow of values which should underlie the imposition of any tax. State courts should not be allowed to use the concept of "unitariness" as a magic formula to justify determinations of taxing authorities without performing the required analysis of the functional business realities of the taxpayer.

In this light, the indicia of unitariness which the Minnesota Court found with respect to Associated Dry Goods have no relevance to the production of income or the flow of cash which should be the basis for the imposition of taxes.

Thus, as set forth above, the Minnesota Court incorrectly based its decision on its findings that:

(1) "[there was] one set of stockholders, officers and directors";

(2) there was
   (a) "sharing of information";
   (b) "some group buying"; and
   (c) "periodic reports and conferences";

(3) "preparation of tax returns at the corporate level";

(4) "one pension plan";

(5) "centralized purchasing of casualty insurance";

(6) "various consultant services [at the corporate level]"; and

(7) "funds are commingled and used to fund capital improvements and for loans back to store divisions."

App. A, p. 9a-10a.

When gauged against the criteria which are constitutionally relevant, the existence of one set of stockholders, officers and directors is irrelevant. Similarly, sharing of information, group buying and periodic reports and conferences have no effect upon the production of income. Preparation of tax returns at the corporate level is only a matter of convenience and could be accomplished by appropriate experts outside the corporation. To have one pension plan is no different from many other diverse operations, such as independent lawyers who have one pension plan through the American Bar Association. Centralized purchasing of casualty insurance again means only the use of a single point of contact which again could be accomplished by an outside broker or agency without any assertion of unitariness.

The same comment can be made with various consolidated services and the fact that corporate funds are commingled bespeaks only the stewardship operation of the owner which acts as a bank for the various diverse phases of its business.[10] If all of these functions were performed by outside agencies, it would be clear that they do not contribute to the quality of unitariness. In contrast, the functional aspects of the merchandise business which is the function of each Associated Dry Goods division are the income producing centers and are thus the taxable entities and, indeed, one of the findings of the Minnesota Court is that: "*[Powers] receives all of its income from the sales at its stores—i.e., it receives no income from other Associated Dry Goods divisions or subsidiaries.*" (Emphasis added.) App. A, p. 8a.

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[10] Of course, the services referred to contribute to the efficiency of a corporation. To improve efficiency of an enterprise is the purpose of business; but such efficiency steps are not a valid basis for imposition of taxes. As indicated in Note 5, *supra*, "Income, from whatever source, always is a business advantage," but the decisions of this Court demand more. 458 U.S. at 363.

In view of these functional realities, found but ignored by the Minnesota Supreme Court, it is important for this Court to reinstruct the state courts that unitariness does indeed pertain to functional realities and to flows of values, and not to the irrelevant, amorphous indices of corporate procedure and corporate structure upon which the state courts continue to rationalize their affirmances of the taxing authorities' *a priori* determinations of taxability (*i.e.*, the determination of what renders the greatest income to the state).

CONCLUSION

For the reasons stated, this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

Appendix A

Opinion of the Supreme Court of the State of Minnesota, March 23, 1984

STATE OF MINNESOTA

IN SUPREME COURT

C6-83-227

Tax Court, SIMONETT, J.

THE COMMISSIONER OF REVENUE,
Respondent,

vs.

ASSOCIATED DRY GOODS, INC.,
Relator.

Endorsed
Filed March 23, 1984
Wayne Tschimperle
Clerk of Appellate Courts

SYLLABUS

1. The Tax Court's determination that relator's multistate business is a "unitary" business for purposes of assessing state income taxes is reasonably supported by the evidence and has a reasonable basis in law.

2. Since relator was properly found to be a unitary business, the state was free to use its three-factor apportionment formula for tax purposes.

Affirmed.

Heard, considered and decided by the court en banc.

OPINION

SIMONETT, *Justice*.

The relator taxpayer, with headquarters in New York City, has retailing divisions located throughout the United States, including the Powers Dry Goods Company division in Minnesota. The Tax Court held that the taxpayer was a "unitary" business conducted within and without Minnesota, so that the taxpayer's aggregate income from all its divisions was to be apportioned under the three-factor formula of Minn. Stat. §290.19 (1982) to determine the Minnesota state income taxes due. We affirm.

Appendix A

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In 1916, Associated Dry Goods was incorporated as a Virginia corporation with corporate headquarters in New York City and with eight retail stores, including Powers Dry Goods Company in Minneapolis, as subsidiaries. In subsequent years, more stores were added. In 1951, Associated Dry Goods reorganized, eliminating the subsidiaries and becoming one corporate entity with a number of separate retailing divisions operating in this country. Powers Dry Goods Company is one of the divisions, operating seven stores in Minnesota.

For the tax years February 1, 1967, through January 31, 1976, the taxpayer filed Minnesota state income tax returns, reporting on a separate accounting basis only income from the Powers Dry Goods division. On May 17, 1977, the Commissioner of Revenue assessed additional state income taxes for these years in the aggregate amount of $280,085.06. The assessment was appealed by Associated Dry Goods to the Tax Court, which, on November 2, 1982, affirmed the Commissioner's order, finding that the taxpayer was a "unitary business" for the years in question and that its income was properly apportioned by the three-factor formula of Minn. Stat. §290.19, subd. 1(2) (1971 & 1974). This writ of certiorari followed.

The issues on appeal are best phrased as follows: (1) Did the Tax Court err in finding that Associated Dry Goods was a "unitary" business? (2) If Associated Dry Goods was conducting a "unitary" business in this state, could Minnesota base its state income tax on an apportionment of the taxpayer's net income to this state by the three-factor formula? The first issue is basically factual and the second is more a question of law, but both questions implicate the constitutional limitation of due process under the Federal and Minnesota constitutions.

If a business is carried on partly within and partly without this state, then Minn. Stat. §290.19 (1982) provides that the entire income derived from the business shall be considered in determining the business' state income tax under a three-factor apportionment formula. This formula apportions income on the basis of a per-

centage representing the arithmetic average of the ratios of sales, property, and payroll within Minnesota to the sales, property, and payroll of the business as a whole. *See* Minn. Stat. §290.19, subd. 1(2)(a) (1976). The Commissioner applied this formula to arrive at his additional assessment.

In making an assessment, "a State may not tax value earned outside its borders." *ASARCO Inc.* v. *Idaho State Tax Commission*, — U.S. —, 102 S.Ct. 3103, 3109 (1982). On the other hand, recognizing that it is not always easy to determine what income of a multistate business is earned within a state and what without, it has long been the law that, if the business is "unitary," an apportionment formula which considers the local business as part of the whole may be used. We have said:

> A multistate business is a unitary business when the operations conducted in one state benefit and are in turn benefited by the operations conducted in another state or states. The test to be applied in determining whether a business is a unitary one is based upon the following inquiry: Is the operation of the business within the state "dependent upon or contributory to the operation of the business outside the state"?

Western Auto Supply v. *Commissioner of Taxation*, 245 Minn. 346, 355-56, 71 N.W. 2d 797, 804 (1955). This definition appears as well in our statutes.[1] *See also, e.g., Great Lakes Pipe Line Co.* v. *Commissioner of Taxation*, 272 Minn. 403, 138 N.W. 2d 612 (1965); *Maurice L. Rothschild & Co.* v. *Commissioner of Taxation*, 270 Minn. 245, 133 N.W. 2d 524 (1965).

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[1] Minn. Stat. §290.17, subd. 2(4) (1982), provides in part:

> The term "unitary business" shall mean a number of business activities or operations which are of mutual benefit, dependent upon, or contributory to one another, individually or as a group. Unity shall be presumed whenever there is unity of ownership, operations, and use, evidenced by centralized management or executive force, centralized purchasing, advertising, accounting, or other controlled interaction. Unity of ownership will not be deemed to exist unless the corporaiton owns more than 50 percent of the voting stock of the other corporation.

Appendix A

Minnesota Supreme Court Opinion

Associated Dry Goods strenuously contends it is not a "unitary" business, at least not insofar as Minnesota is concerned,[2] if the *Western Auto* test is properly applied. Associated Dry Goods has brought this same claim to us before, for the years 1954 through January 1967. On that occasion, we affirmed a Tax Court ruling that the taxpayer was a unitary business without opinion because this court was evenly divided. *See Associated Dry Goods Corp.* v. *Commissioner of Taxation*, 306 Minn. 532, 235 N.W. 2d 821 (1975), *cert. denied*, 425 U.S. 999 (1976). The taxpayer now returns, pointing out that recently the United States Supreme Court has issued five decisions on the unitary enterprise concept in state taxation of multijurisdictional businesses,[3] and that these decisions clarify the con-

[2] It appears that Associated Dry Goods files state income tax returns on an apportionment formula basis, rather than by separate accounting, in California, Colorado, Connecticut, Kentucky, Massachusetts (since 1971), Missouri, New York, Pennsylvania, Virginia, West Virginia, and the District of Columbia. Each state's definition and application of the unitary business-apportionment formula may, of course, vary, so long as it is within the parameters of constitutional due process.

[3] In *Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont*, 445 U.S. 425 (1980), the question was whether Vermont could tax as a unitary business on an apportionment basis, a vertically integrated petroleum business operating in 40 states and several foreign countries. Held, yes. In *Exxon Corp.* v. *Wisconsin Department of Revenue*, 447 U.S. 207 (1980), the question was whether Wisconsin could apportionately tax a vertically integrated petroleum company with marketing, exploration and production, and refining operations, but with only marketing in Wisconsin. Held, yes. In *ASARCO, Inc.* v. *Idaho State Tax Commission*, — U.S. —, 102 S.Ct. 3103 (1982), the question was whether Idaho, in apportionately taxing a company with multistate mining operations, including a silver mine in Idaho, could include income from dividends, interest, and capital gains from five foreign mining subsidiaries. Held, no. In *F. W. Woolworth Co.* v. *Taxation and Revenue Department*, — U.S. —, 102 S.Ct. 3128 (1982), the question was whether New Mexico could include dividend income from Woolworth's foreign subsidiaries in its apportionment formula. Held, no. Finally, in *Container Corporation of America* v. *Franchise Tax Board*, — U.S. —, 103 S.Ct. 2933 (1983), the question was whether California could apply the unitary business principle to a nondomiciliary corporation operating as a vertically integrated paperboard packaging manufacturer in California and elsewhere, so as to include dividend income from overseas subsidiaries. Held, yes.

cept favorably to its cause. These decisions are not unhelpful, but the facts of each case are varied and many, and each case—as does ours here—turns largely on its own situation. There are no "bright lines"—but some principles and matters of emphasis do emerge.

For a unitary business, there must be "some sharing or exchange of value not capable of precise identification or measurement—beyond the mere flow of funds arising out of a passive investment or a distinct business operation—which renders formula apportionment a reasonable method of taxation." *Container Corporation of America* v. *Franchise Tax Board*, —— U.S. ——, 103 S.Ct. 2933, 2940 (1983). Or put another way, a multistate enterprise may be characterized as a unitary business where there are "contributions to income resulting from functional integration, centralization of management, and economies of scale." *Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont*, 445 U.S. 425, 438 (1980).[4] Where these characteristics exist, use of a separate geographic accounting system may fail to account for these contributions to income, and an apportionment formula may then be used.

There must be "some bond of ownership or control" uniting the business enterprise. *Container Corp.*, 103 S.Ct. at 2940. Also, "[o]ne must look principally at the underlying activity, not at the form of investment," and it must be remembered that "the form of business organization may have nothing to do with the underlying unity or diversity of business enterprise." *Mobil*, 445 U.S. at 440. A unitary business may be either vertically or horizontally structured. *Container Corp.*, 103 S.Ct. at 2941. On the other hand, *ASARCO, Inc.* v. *Idaho State Tax Commission*, —— U.S. ——, 102 S.Ct. 3103 (1982), and *F. W. Woolworth Co.* v. *Taxation and Revenue Department*, —— U.S. ——, 102 S.Ct. 3128 (1982), seem to suggest something more is needed than evidence of common ownership, high-level executive oversight and certain centralized nonoperating functions such as accounting, legal and financing ser-

[4] This functional interdependence test seems to have evolved from the old three-unities test of *Butler Brothers* v. *McColgan*, 17 Cal.2d 664, 111 P.2d 334 (Cal.Ct.App. 1941), *affirmed*, 315 U.S. 501 (1942), namely, unity of ownership, unity of operation, and unity of use.

vices, and something more than just adding to the profit of the parent; rather there must be some "rational relationship" between the outside income attributed to the taxing state and the intrastate values of the enterprise so that the local in-state operation is more than simply a discrete business enterprise. *ASARCO*, 102 S.Ct. at 3114-15; *F. W. Woolworth*, 102 S.Ct. at 3135. In the most recent decision, *Container Corp.*, however, it was held that the taxpayer's assistance to the foreign subsidiaries in the form of equipment and personnel needs, loaning funds and guaranteeing loans, giving substantial technical assistance, and the supervisory role played by the corporate officers in providing general guidelines to the subsidiaries was sufficient to tax the enterprise as a single entity.

Against this background, we examine the facts of our case. Associated Dry Goods operates as a "retail ownership group." Its stores are set up as separate divisions; although they are not corporate subsidiaries, neither are they "chain stores." Each of the divisions, of which Powers is one, operates several retail department stores. Each division, however, is operated independently, catering to different sections of society, carrying different merchandise lines, and using different methods of operation. The diversity extends from the relatively small Powers Dry Goods to the elite Lord and Taylor stores.

Formal control of Associated Dry Goods is in a single board of directors, one set of corporate officers and one set of stockholders. The New York office acts as banker, counsellor, and coordinator of activities of the divisions, but almost all day-to-day control over operations and management is delegated to the division officers. Division presidents, such as for Powers, are given nearly total authority over hiring, firing, merchandising, warehousing, pricing, sales advertising, and store layout for their own divisions. The division president and treasurer are appointed as corporate officers and the division president is given corporate signatory authority, but the appointments are mostly honorary and the signatory authority is rarely exercised. Corporate officers dictate few corporate policies, most of which are advisory only.

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The New York corporate officers oversee several aspects of the division operations. Divisions are annually audited internally by the New York officers and externally by Touche Ross & Co., hired out of New York. Semi-annual (seasonal) budgets, including charitable contributions, must be approved by the board of directors. Both state and federal tax returns are prepared in New York. The divisions keep the New York offices informed through a series of daily, weekly, monthly, quarterly, semi-annual and annual reports. These reports are compiled and distributed throughout the divisions to compare the operations of the divisions.

As income is accumulated at a division, it is transferred to New York, where it is commingled with other corporate funds. As a division needs financing to maintain sufficient balances at local banks or to fund capital improvements, the New York office lends funds back to the divisions. All major renovations or the building of new stores must be approved for funding by the board of directors. The corporation uses profits to purchase additional businesses, most of them related to dry goods sales.

The New York office provides some services for all of the divisions. All property and casualty insurance is centrally purchased (health insurance is purchased locally). An employee pension plan is managed in New York, and an executives' stock option program is provided by Associated Dry Goods. In addition, the New York office has a Market Research Division which distributes information and, for a fee, assists divisions in making decisions about purchases. Divisions do very little group purchasing, less than 10% of total purchases, but are free to coordinate purchases with other divisions. The corporate offices also provide consultant services through their in-house counsel, a corporate engineer, an architect, a fixtures and planning officer, an interior decorator and a realty officer. Associated Dry Goods Credit Corporation is a subsidiary of Associated Dry Goods which purchases the accounts receivable from the divisions and lends the parent corporation money to be used for capital investment. Another wholly-owned subsidiary, Adcor Realty, purchases and leases out realty, often to the divisions. Powers Dry Goods leases three stores from Adcor. Division presidents are also

officers of Adcor. Divisions occasionally join together to share services; thus Powers uses the St. Louis Stix Dry Goods division's computers for billing services.

Each division is set up to operate as a separate business. Although on occasion Associated Dry Goods corporate officers would merge or close stores which were unprofitable, most decisions regarding expansion or renovation of stores are made and planned at the division level. All of the Powers Dry Goods stores are in Minnesota. The stores are designed to compete effectively in the local market (as opposed to competing with national chain stores). Powers makes its own purchases, trains its own employees, and owns its fixtures, equipment, and delivery fleet. Powers does its own accounting, has its own local banks and legal counsel, does its own advertising, and receives all of its income from the sales at its stores—*i.e.*, it receives no income from other Associated Dry Goods divisions or subsidiaries.

The Tax Court stated, "In our opinion, a decentralized style of management does not prevent us from finding that Associated is a unitary business for tax purposes," noting that "ultimate authority and control is vested with Associated's shareholders and board of directors." The Tax Court found *Maurice L. Rothschild & Co* v. *Commissioner of Taxation*, 270 Minn. 245, 133 N.W. 2d 524 (1965), to be analogous. There the taxpayer also was in the retail department store business, operating three stores in Chicago and three in the Twin Cities, each set of stores under a different name, and we affirmed the Tax Court's finding of a unitary business.

Associated Dry Goods argues that the Tax Court misapplied the unitary business test. Quoting *Mobil Oil's* admonition that it is the underlying realities of the business, not superficial form, that counts, relator argues that the Tax Court looked only at "unity of ownership," the single corporate structure, and not at how the busi-

ness was actually functioning.[5] It argues that the "stewardship activities" of the New York corporate offices, which are concerned with the problems and prerogatives of ownership, must be distinguished from the "operating functions" of Powers, and that the unitary business test focuses on the latter.

In particular, appellant relies on *F. W. Woolworth* v. *Taxation and Revenue Department of New Mexico*, — U.S. —, 102 S.Ct. 3128 (1982). It points out this is the first United States Supreme Court decision applying the unitary business principle to a taxpayer engaged solely in a retailing business—at least the first case since *Butler Brothers* v. *McColgan*, 315 U.S. 501 (1942). In *Woolworth*, the Supreme Court held that New Mexico could not apply the unitary business test to the dividend income of four of Woolworth's foreign subsidiaries, which were engaged in chain store retailing in foreign countries. The Court said it was not enough that the parent derives income, which is a business advantage, from its subsidiaries, or that the relationship between the parent and the subsidiaries has potential for business advantage, but that the test goes to the actual underlying, functional realities of the business. The Court concluded that except for the kind of occasional oversight any parent gives a subsidiary—*e.g.*, with respect to capital structure, major debt and dividends—there was little or no integration of the business activities or centralization of management.

Nevertheless, while our case has similarities to *Woolworth*, there are also differences. Indeed, we think the facts of this case are much closer to *Container Corp.*[6] Here, there is evidence of centralization of management: there is one set of stockholders, officers and direc-

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[5] In its memorandum the Tax Court took the view that *F. W. Woolworth* and *ASARCO* were essentially irrelevant because they dealt with state taxation of dividend income from foreign subsidiaries. The reasoning of these cases is, however, pertinent because it is the underlying realities of the business activities that are involved in the "unitary" business test, not the form of the income.

[6] In *Container Corp.*, the Supreme Court indicated it had reversed in *F. W. Woolworth* because the state court had made legal errors not only in the conclusions it drew but in the legal standard it applied to the facts of that case. *Container Corp.*, 103 S.Ct. at 2946 n. 15.

tors who perform the kind of executive oversight that goes beyond "potential" to some degree of "implicit" control. *Container Corp.*, 103 S.Ct. at 2946-47 n. 16. There is also evidence of functional integration: for example, the sharing of information, some group buying, periodic reports and conferences, preparation of tax returns at the corporate level, centalized purchasing of casualty insurance, one pension plan, and various consultant services. Finally, there is evidence of economies of scale: funds are commingled and used to fund capital improvements and for loans back to the divisions; accounts receivable are purchased from the division by a New York subsidiary.

The Tax Court's findings are to be sustained if reasonably supported by the evidence. *Super Valu Stores, Inc.* v. *Commissioner of Taxation*, 291 Minn. 169, 175, 190 N.W. 2d 67, 70 (1971). A decision of the Tax Court will not be disturbed if it has any reasonable basis in the law. *Red Owl Stores, Inc.* v. *Commissioner of Taxation*, 264 Minn. 1, 5, 117 N.W. 2d 401, 405 (1962). We hold that the Tax Court's determination that Associated Dry Goods' activities in Minnesota are sufficient to qualify as a "unitary" business is reasonably supported by the evidence and has a reasonable basis in the law.

Finally, we need to address the taxpayer's assertion that "where income can, in fact, be fully and accurately accounted for on a separate basis, apportionment is constitutionally impermissible and income *must* be reported on a separate accounting basis." (Relator's Brief at 15) (relator's emphasis). We disagree.

In prior cases we have rejected the argument that where separate accounting can be used, it must be used. *See Maurice L. Rothschild & Co.*, 270 Minn. at 255-56, 133 N.W. 2d at 531; *Walgreen Co.*, 258 Minn. at 530, 104 N.W. 2d at 719-20. Neither does the United States Supreme Court require a state to use any one formula. *Container Corp.*, 103 S.Ct. at 2939. Indeed, that Court has noted that geographical accounting "is subject to manipulation and imprecision, and often ignores or captures inadequately the many subtle and largely unquantifiable transfers of value that take place among the components of a single enterprise." *Id.* at 2940.

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The Tax Court found that it was feasible for the taxpayer, using generally accepted accounting principles, to account for the operations of the Powers division as a separate profit center. A distinction must be made, however, between internal accounting for the purpose of measuring a division's performance and an accounting for the purpose of state taxation. The two are not the same. Thus relator's phrasing of the issue—whether a division's income must be reported on a separate basis when, in fact, that income can be "fully and accurately accounted for" on a separate basis—begs the question. It is precisely because the taxpayer's activities are unitary that the income or values derived from various parts of those activities cannot be fully and accurately accounted for on a separate accounting basis and that an apportionment formula consequently may be used.

The issue here is not whether the state's application of its three-factor apportionment formula has, in fact, produced an arbitrary or unfair tax burden in this case; that issue has not been raised. The Tax Court having found that Associated Dry Goods was a unitary business, it follows that the state was free to use, as it did choose to do, its three-factor apportionment formula rather than separate division accounting for tax purposes.

Affirmed.

Appendix B

Opinion of the Tax Court of the State of Minnesota, November 2, 1982

STATE OF MINNESOTA

TAX COURT

Docket No. 2457

ASSOCIATED DRY GOODS CORP.,

Appellant,

vs.

THE COMMISSIONER OF REVENUE,

Appellee.

In the Matter of an appeal from the Commissioner's Order dated May 17, 1977, Relating to Corporate Income Tax Liability of Appellant for the Fiscal Years Ended 2/3/68, 2/1/69, 1/31/70, 1/31/71, 1/29/72, 2/3/73, 2/2/74, 2/1/75 and 1/31/76.

Order dated November 2, 1982.

The above matter was tried before the Tax Court, sitting *en banc*, October 7, 8, 9 and 12, 1981. Additional facts were also entered into the record by way of a Stipulation of Joint Exhibits, and a separate Stipulation of Facts, both of which were filed with the Tax Court at the opening of the trial.

The case was submitted to the Court for decision on post-trial briefs and memoranda on August 6, 1982.

Ralph W. Peterson and Daniel T. Blomquist of Eastlund, Peterson and Solstad, Ltd. appeared on behalf of Appellant.

Paul R. Kempainen, Special Assistant Attorney General, appeared on behalf of Appellee.

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SYLLABUS

During the tax years in issue, Appellant was carrying on a unitary business within and without Minnesota and properly taxed on its income apportioned to Minnesota by the three-factor formula under Minn. Stat. 290.19, subd. 1(2).

FINDINGS OF FACT

1. The Appellant, Associated Dry Goods Corp. (hereinafter, "Associated"), is a Virginia corporation with its principal office located at Fifth Avenue and 39th Street, New York, New York. Associated is duly qualified to do business within the State of Minnesota.

2. Associated is a single corporation with a single board of directors and a single group of corporate officers. The corporation reports to the shareholders through one consolidated Annual Report and one consolidated Financial Statement prepared for Associated by Touche Ross & Company.

3. During the tax years in issue, February 1, 1967 through January 31, 1976, Associated had in addition to its corporate office up to nineteen (19) retail store divisions located throughout the United States, each of which was a division and not a subsidiary corporation.

4. The division of Associated which operates in the State of Minnesota, Powers Dry Goods Co. (hereinafter, "Powers") has been a part of the same group of commonly owned retail stores since 1916 when Associated was incorporated.

5. Until 1951, Powers and the other retail companies remained as subsidiaries of Associated. But in 1951, Associated went through a corporate reorganization wherein all the subsidiaries were merged into one corporation, and became divisions of Associated rather than independent subsidiary corporations. Since 1951, Powers has been a division of Associated and has conducted its business in this state under Associated's corporate charter.

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6. After its reorganization in 1951, Associated expanded and acquired ten new retail divisions throughout the country by purchasing already established retail store companies.

7. In 1973 Associated created an entirely new retail division called Robinson's of Florida. This new division was created by the corporate headquarters, using some executives from already established divisions of Associated, and financed by the retained earnings of the entire corporation.

8. From time to time, Associated consolidates its divisions for more efficient and profitable operation. The J. N. Adam Co. (one of the original Associated stores operating in Buffalo, N.Y.) was consolidated into the William Hengerer Co. division. Likewise, in 1975 or 1976 the Erie Dry Goods division was consolidated into the Joseph Horne division, and the John Bressmer division was consolidated into the Stix, Baer & Fuller division.

9. The corporate headquarters in New York employs about 150 people and takes up two full floors and two half floors of an office building on Fifth Avenue. Approximately 50,000 people are employed outside of coprorate headquarters.

10. According to the corporation's 1968 Annual Report, Associated's corporate headquarters staff, though small, exercises overall control of store operations through an extensive exchange of monthly operating reports and by the review and approval of seasonal forecasts of sales, profits and capital expenditures.

11. Associated's board of directors holds its regular meetings in New York, at which times it reviews and discusses the monthly operating reports and comparative sales reports submitted by the various divisions and consolidated by the corporate officers. Additionally, the board of directors discusses and approves all capital budgets, seasonal budgets (Fall and Spring) and contributions budgets which are submitted by the retail store divisions through the corporate officers. The board of directors also exercises authority over the opening and closing of local bank accounts by the various divisions and appoints those with signature authority over the accounts.

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12. Appointments of all Associated's corporate officers, as well as the presidents and treasurers of the retail store divisions, are made by the board of directors. Each division president is also a corporate or divisional vice-president of Associated and each division treasurer is also an assistant secretary of Associated.

13. During the years at issue herein the corporation's top executive positions usually consisted of the chairman of the board (who was also chief executive officer), a president, and a vice-chairman. These offices changed hands during the years in question. All divisional presidents reported to, and were subject to the direction of, these corporate officers. In actual practice the top corporate officers divided up the various divisions among themselves for purposes of supervising them. Each corporate officer was ultimately responsible for those parts of the business assigned to him. In addition to this supervision by the corporate officers, Associated also assigned to some division presidents the title of "regional executive vice-president," with responsibility for supervising other divisions.

14. During the years at issue herein the president of the Powers division was Mr. Alden R. Berman, who was also a vice-president of Associated and a vice-president of one of Associated's wholly-owned real estate subsidiaries, Adcor Realty Corporation which owned the land on which some of the Powers stores were built. As president of Powers, Mr. Berman personally reported to a corporate officer at Associated's New York headquarters (either Mr. O'Brien when he was president, Mr. Pivirotto when he was chairman of the board and chief executive officer or Mr. Seiler when he was chairman of the board) and also had communications to and from the corporate headquarters by means of letter, telephone and personal meeting.

15. Associated's top corporate officers visit the store divisions which they directly supervise about twice a year. After these visits the corporate officer making the trip would circulate his observations and comments among the division presidents. Additionally, the corporate treasurer of Associated would try to visit each store division once a year for two or three days.

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16. Division presidents, including Mr. Berman, would be called upon to do work of a corporate-wide nature. For example, in 1971 Mr. Berman sponsored a corporate-wide shoe committee made up of buyers from various divisions for the purpose of improving the means of exchanging shoe information between the divisions. That committee recommended certain changes in the shoe information contained in the McKim Report (a monthly sales report by each division). Mr. Berman followed up on that recommendation by polling all the store divisions on the suggested revision and then reporting the results by letter to Associated's president, Arthur J. O'Brien. The purpose of these suggested changes to the McKim Report was to improve Powers' operation by getting more meaningful figures, which would be beneficial to the division.

17. Associated frequently utilizes its key personnel by offering them transfer/promotions from one division to another, and from divisional to corporate positions. All such transfers or promotions were voluntary and some were initiated by the employees or at the division level. During the year 1967, of the twenty-five persons who were named to major management positions in Associated's store divisions, all were promoted from within Associated itself.

18. During the years at issue herein, Associated's financial vice president and treasurer, Mr. George E. Troutt, had total responsibility for Associated's accounting and financial matters, and managing the financial side of the business, including making loans and loan arrangements with banks, advancing funds to the divisions and withdrawing funds from the divisions, managing divisional average daily bank balances and authorizing the divisions to borrow funds locally. The corporate treasurer was also responsible for preparation of all the corporation's federal and state tax returns and the payment of its taxes. This responsibility was handled by a corporate assistant treasurer named Ralph Morgan. In addition, Mr. Troutt dealt directly with the division treasurers on financial and accounting matters, and he would send corporate employees to the divisions for purposes of conducting systems audits.

19. All of Associated's divisions used a standardized accounting system for the purpose of making accurate comparisons between

the store divisions. The local division treasurer and accounting personnel are responsible for the day-to-day accounting functions.

20. During most of the years at issue herein the division treasurer of Powers was Mr. Robert L. Paplow, who also held the office of assistant secretary of Associated and assistant secretary of Adcor Realty Corporation. As a division treasurer, Mr. Paplow reported to the division president on day-to-day matters, but was also responsible to the corporate headquarters and corporate treasurer.

21. The position and responsibilities of Associated's division treasurers were outlined in a memorandum included as part of Jt. Exh. 18, which outline was substantially verified by Mr. Paplow at trial. It reads in part as follows:

> "The Treasurer in our store divisions has dual responsibilites. In his day to day work, including the supervision of accounting and credit functions and in any of the other store operations assigned to him, he reports solely to the Chief Executive Officer of the division. In matters of accounting procedure, accounting and credit policies, and general fiscal responsibilities he must report not only to the Chief Executive Officer of the division but also the New York corporate officers and directors of the corporation. The Treasurer's appointment is made by the directors of Associated upon the recommendation of the Chief Executive Officer of the division and the corporate officers.
>
> It is highly important that our accounting be standardized as much as possible so that we have a consistent policy of reporting operations not only between the store divisions but also from accounting period to accounting period. Accounting manuals, letters of instruction, and perhaps most of all, precedent, have fairly well defined these accounting policies and there is, therefore, little latitude left to the division treasurer or store Chief Executive Officer for discretionary accounting.
>
> * * *
>
> Any variation from these high standards of accounting either as to consistency or integrity cannot be permitted and the Treasurer in each of the store divisions is the man whom your company's corporate officers and directors will hold responsible for any deficiency."

Appendix B

Minnesota Tax Court Opinion

22. Associated holds regular meetings attended by its corporate and divisional officers, as follows: two each year for its divisional presidents, one each year for its divisional treasurers, and one each year for its divisional personnel managers.

23. The presidents' meetings usually run for two and one-half days. The purpose of the meetings is to discuss all of the problems of operating Associated's retail stores. The agenda is prepared by Associated's president and topics are assigned to division presidents who make a presentation on an assigned subject, which is followed by a general discussion of that subject. Frequently merchandise people are invited to attend to exchange information and ideas on merchandising. The meetings provide a forum for exchanging expense-saving ideas and information between the stores. The expense-saving ideas from each meeting are summarized in writing and distributed to the store divisions where they are reviewed and the results reported back to the corporate headquarters. Mr. Berman, the president of Powers, testified that this regular interchange of ideas between divisions was extremely welcome.

24. The annual treasurers' meetings usually run for three days and are attended by all the division treasurers as well as corporate officers such as Associated's treasurer and Associated's general counsel and corporate secretary. The purpose of the meetings is to discuss problems of common operational concern to the divisions. The agenda for these meetings is prepared in advance by the corporate treasurer. The subjects are picked in the hope that their study at the meetings will lead to improvements in expense controls and store operations.

25. The personnel managers' meetings are held once a year at various locations for divisional personnel managers to discuss problems of common operational concern.

26. All the divisions of Associated, including Powers, are required to submit numerous regular reports to the corporate office in New York on a daily, weekly, monthly, quarterly, seasonal and annual basis. These reports are listed in a corporate document entitled "Schedule of Store Reports and Mailing Dates to A.D.G."

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27. Some of the various reports made by each division to Associated's New York office (e.g., the daily sales report, the McKim Report, etc.) are compiled together by the corporation on a comparative basis and then distributed back to all the divisions to show how their operations compare with one another.

28. The comparative reports compiled by Associated's New York headquarters from information provided by the divisions are an important and valuable tool in the day-to-day operation of the business, and they constitute a mutual benefit to Powers, the other store divisions and to Associated as a whole.

29. Each divisional president, including Mr. Berman, was required to submit semi-annual budgets (called the Spring and Fall seasonal budgets) to the corporate headquarters in New York for review and approval by the corporate officers. These budgets were the division's operational forecast of projected sales, volume, markup, markdowns, expenses, etc. for each coming sales season. After the seasonal budgets are approved by the corporate officers they are then submitted to the board of directors for its discussion and final approval.

30. Each division of Associated is also required to submit Spring and Fall seasonal sales plans to the corporate headquarters in New York for approval. These semi-annual sales plans are then compiled and circulated among the divisions by the corporate officers for purposes of review and making revisions in light of conclusions reached by other divisions.

31. Associated's store divisions are financially interdependent in the sense that all divisions contribute to Associated's earnings and each division transfers its surplus earnings to the corporate office in New York where they are commingled with other corporate funds. Out of these combined corporate earnings Associated then transfers back to the various divisions on an as needed basis to be used by the divisions as both expansion capital and as day-to-day operating capital. A system of automatic cash transfers between the divisions and the corporate headquarters was established by Associated under the direction of the corporate treasurer.

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32. Associated's corporate borrowings, including those made through its wholly owned subsidiary, Associated Dry Goods Credit Corporation, are based upon the combined assets, receivables and financial strength of all its store divisions. Each division also uses Associated's corporate letters of credit in making purchases from foreign sources and no local borrowing is done by any division except on direction from Associated's corporate headquarters.

33. With regard to financial matters and assets Associated considers itself one corporation with ultimate authority over how and where the earnings and assets of the store divisions are to be used. With regard to its corporate philosophy, Associated has maintained the same corporate philosophy throughout the years at issue herein and up to the present time and in 1979 it reported to its shareholders that one of its accounting principles was as follows:

> Single Business Segment. The Company conducts a general department store business through 16 department store divisions and one specialty store division. Because of the similarity of the business operations of the divisions, the Company considers itself to be a single business segment.

34. Associated has the financial data available as well as the capacity to accurately account for the Powers division's income, expenses and profits or losses consistent with generally accepted accounting standards.

35. Each store division uses its own staff of buyers and supervisory merchandise managers in buying merchandise for resale in the stores. Buying decisions are essentially made on the local division level.

36. Buyers and their managers from the various divisions also are organized into voluntary corporate-wide buying committees by Associated's corporate Market Research Division in New York for purposes of comparing and exchanging information, surveying the markets and engaging in group purchasing of common items of merchandise. These group buying activities are mutually beneficial to the individual divisions, and thus to Associated as a whole, by insuring the supply and delivery of adequate numbers of goods and

by obtaining lower prices because of the higher volume being purchased.

37. Associated's Market Research Division is located in New York and during the years at issue herein was headed by a corporate vice-president, Mr. Gardner B. Mackinnon, with whom division presidents would correspond about such things as training of buyers. In its 1968 Annual Report to its shareholders Associated described its Market Research Division as follows:

> The Market Research division in New York provides an essential service for these buyers. Market representatives in this office, each specializing in a particular classification of merchandise, are a constant source of information and guidance to the out of town buyers during their frequent visits to New York markets. They hold meetings and merchandise shows and organize committee buying activities in both the domestic and foreign markets. Additionally, through bulletins and telephone calls buyers are kept currently informed of new developments.
>
> Because only Associated stores are served by this Market Research staff, there is a free exchange of merchandise information among the buyers from all stores. Much of the fashion stimulation which makes shipping in our stores such a unique shopping experience for customers starts in this important market research activity.

These activities by the Market Research division were expanded beginning in 1975, as stated in that year's Annual Report, as follows:

> We have also undertaken a major program to expand and strengthen our Market Division. Historically, the Market Division in the corporate office consisted of forty to fifty market representatives who specialized in particular merchandise areas. These specialists essentially provided market research which they made available to the buyers of our store divisions. With the exception of certain group purchases, in which many of our divisions participated, the buying decisions for a major portion of the merchandise purchased for our stores were made by the respective store buyers. This system has been and will continue to be our primary merchandising system.

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> However, in an effort to assure a greater participation by our stores in potentially profitable fashion trends, we have implemented a system of co-responsibility, in which the corporate market representatives and the store buyers share the responsibility for selecting the proper merchandise for our stores. We believe this modification will greatly enhance our ability to capitalize on emerging fashion trends, and thus to be better prepared to serve our customers.

38. In 1975 and early 1976, Associated initiated an aggressive corporate-wide merchandising program for the purpose of producing more rapid sales growth by concentrating on certain selected merchandise areas. One such area was mens' furnishings in which the following corporate-wide activities were undertaken, as reported in the 1976 Annual Report:

> The Corporate Menswear staff was substantially enlarged and strengthened, and made responsible for identifying properly assorted basic styles and current fashion trends.
>
> Domestic group purchase activity accelerated rapidly during 1976, with Menswear accounting for 74% of the Companywide total.
>
> The Menswear group import program was also expanded to more than double the 1975 volume. This was initiated at a two day corporate meeting at which our divisions were exposed to a well edited collection of merchandise gathered from all over the world and offered at attractive prices based on large volume commitments.

39. Associated engaged in foreign buying of merchandise in which it would form and send committees of its divisional buyers overseas to make purchases, including group buying. To coordinate this effort, Associated had a corporate vice-president in charge of foreign operations, and a corporate import manager officed in the New York headquarters. Group foreign buying, however, represented between 1½ and 2½ percent of total foreign purchases for Associated during the years in question. Such buying was optional and each division was free to purchase from its own sources.

40. Associated also had a London based, wholly-owned subsidiary, Associated Dry Goods (U.K.) Ltd., to conduct a foreign

market research operation very similar to Associated's Market Research Division in New York. From time-to-time Associated would issue corporate "Import Bulletins" which dealt with subjects such as standard corporate forms for making overseas purchases and combining the import shipments of all stores and shipping them to New York. Associated also hired resident foreign buying agents in various countries whose commissions would be based on the volume of purchases Associated buyers from individual stores would make through them, with higher volumes resulting in lower percentage commissions.

41. Associated has engaged in some limited central buying of goods primarily for its own use, such as carpet padding for the stores and group bidding on store fixtures.

42. The buying committees, both domestic and foreign, are formed by Associated for each merchandise line and are made up of the division buyers and merchandise managers who deal in that line. Each committee would also include a market representative from the corporate Market Research Division. Between meetings of the larger buying committees there would be a corporate steering committee for each line of merchandise consisting of two or three key buyers and a merchandise manager from the store divisions, plus the market representative from the New York headquarters. Over-seeing all this activity would be a store division president who, because of his interest in a particular line of merchandise, would act as the sponsor of that buying activity.

43. For internal accounting purposes, Associated allocated expenses to the various divisions for the buying services it provided on a basis comparable to that charged by independent market organizations.

44. Associated stores used common labels on merchandise they sold to a limited extent. However, use of common labels was voluntary and each store generally used its own labels.

45. The final decision with respect to any major expansion of Associated's division operations, or the building of any new division store, is made by Associated's board of directors. All capital for

expansion and the building of new stores come from the retained earnings of the corporation as a whole, or from other corporate-wide financing.

46. During the years at issue herein Associated had a Store Planning Division located at its New York headquarters which was headed by a corporate vice-president. Working under this vice-president was a team of construction specialists who visited divisions and worked extensively on construction projects, including the following:

1. Corporate architect
2. Corporate engineer
3. Corporate interior designer
4. Corporate fixture coordinator

47. An addition to its Store Planning Division, Associated also has a corporate vice-president for real estate officed in the New York headquarters. During the years at issue herein this vice-president had responsibility for helping the divisions select branch store sites, bringing them together with shopping center developers and becoming involved in the actual negotiations of real estate transactions. In addition, the vice-president for real estate would also sign real estate documents.

48. Associated maintains a corporate "Policy Statement Memoranda" file for use by its divisional presidents and treasurers, each of whom kept a copy in his office. This file contains copies of the various policy memoranda issued by Associated's New York headquarters. It includes corporate-wide policies on the following topics:

1. Cooperative advertising.
2. Retail revisions.
3. Schedule of mailing customer's account monthly statements.
4. Employee discounts.
5. Bid on building and fixtures projects.
6. Political contributions.
7. Executive loans, advances, travel.

8. Conflict of interest.
9. Release of liens.
10. Alteration of credit plans.

Some of these corporate-wide policies were adopted to insure compliance with national laws.

49. Insurance policy negotiations and purchases for both the corporation as a whole and for all store divisions is handled centrally by Associated's corporate headquarters in New York.

50. All charitable contributions which the store divisions propose to make must be submitted to the New York office in the form of a budget for approval by the board of directors.

51. Each store division has its own credit card which is administered at the division level. However, Associated's corporate policy is that no changes are to be made in customer credit plans offered by the store divisions without prior approval by the corporate officers in the New York office.

52. In 1969, Associated created a wholly owned finance subsidiary, called Associated Dry Goods Credit Corporation, to assist in financing the operations of Associated through the purchase of customers' accounts receivable of the parent corporation. These accounts receivable originated in the store divisions, but were treated by Associated as common corporate assets which were then sold by the New York headquarters to Associated Dry Goods Credit Corporation for use as security in borrowing funds. The funds so obtained are then loaned back to Associated for use in financing both its capital projects and its day-to-day operations.

53. Associated has a common pension plan for all employees and also maintained an executive stock option plan.

54. Associated established corporate-wide affirmative action guidelines for its store divisions, and all affirmative action legal questions were handled by a national firm of lawyers.

55. Associated also had a corporate-wide policy affecting employee discounts and a corporate-wide policy on age-65 retirement for all company executives at buyer level and above.

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56. During the years at issue herein Associated had an Assistant Treasurer officed at the New York headquarters who was the corporations's tax manager for both state and federal tax matters. Preparation of the corporation's state and federal income tax returns was done at the New York office under this officer's supervision.

57. During the years at issue Associated filed income taxes in some states on a unitary or apportionment basis and in other states on a separate accounting basis.

58. By his order dated May 17, 1977, the Commissioner of Revenue determined that Associated's net income allocable to Minnesota for the tax years in issue is fairly reflected by using the three-factor formula prescribed in Minn. Stat. 290.19, and assessed either additional income taxes or reductions in income taxes for Associated for those years by apportioning its net income to Minnesota on the basis of that formula. This resulted in an increase in taxes for six years and a reduction in taxes for three years.

59. Associated has appealed from that order, asserting that the three-factor formula does not fairly reflect its income allocable to Minnesota, and that only the separate accounting method does so.

CONCLUSIONS OF LAW

1. During the years in issue, Appellant was carrying on a unitary business within and without Minnesota and properly taxed on its income apportioned to Minnesota by the three-factor formula under Minn. Stat. 290.19, subd. 1(2).

2. The Commissioner's Order dated May 17, 1977 should be affirmed.

LET JUDGMENT BE ISSUED ACCORDINGLY. A STAY OF 15 DAYS IS HEREBY ORDERED.

By the Court

EARL B. GUSTAFSON
Judge

CARL A. JENSEN
Judge

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MEMORANDUM

The Appellant, Associated Dry Goods, is a Virginia corporation that owns and operates nineteen retail store divisions throughout the United States. In Minnesota it operates a Powers division with seven stores in the Twin Cities metropolitan area.

The Commissioner of Revenue considered Associated a unitary business and apportioned its net taxable income to Minnesota by applying a three-factor statutory formula.

The allocation of income of a multi-state business to this state for purposes of taxation is governed by Minn. Stat. 290.17 which during the taxable years 1967 through 1976 read in pertinent part as follows:

> Items of gross income shall be assigned to this state or other states or countries in accordance with the following principles:
>
> * * *
>
> (4) When a trade or business is carried on partly within and partly without this state, the entire income derived from such trade or business . . . shall be governed . . . by the provisions of section 290.19, notwithstanding any provisions of this section to the contrary.

Minn. Stat. 290.19, in turn, provides that the entire net income of a multi-state business subject to the above provision shall be apportioned on a three-factor formula which considers sales, property and payrolls in this state. Minn. Stat. 290.20 states that the "methods prescribed by section 290.19 shall be presumed to determine fairly and correctly the taxpayer's net income allocable to this state," but an aggrieved party "may petition the commissioner for determination of such net income by the use of some other method, including separate accounting."

The Appellant maintains it should not be considered a unitary business subject to formulary apportionment of income but should be taxed on a separate accounting basis, i.e. the net income from the Powers division alone.

The principal argument advanced by Appellant is this: Where income can, in fact, be fully and accurately accounted for on a

separate basis, apportionment is unconstitutional and income must be reported and taxed on a separate accounting basis.

We find that separate accounting for the Powers division as a separate profit center is feasible but disagree that this finding alone prevents taxation on an apportionment basis. The present state of the law appears to encourage, rather than discourage, the formulary apportionment of income of multi-state businesses.

In *Walgreen Company* v. *Commissioner of Taxation*, 258 Minn. 522, 104 N.W. 2d 714 (1960), appeal dismissed, 365 U.S. 767, 81 S. Ct. 912, the Minnesota Supreme Court said:

> As we construe §290.19, subd. 1(2)(b), a certain discretion is vested in the commissioner to determine whether application of the 3-factor formula fairly and properly reflects the net income attributable to Minnesota of a multistate unitary business, or whether the separate accounting method reaches this objective more accurately. Western Auto Supply Co. v. Commr. of Taxation, 245 Minn. 346, 71 N.W. (2d) 797, 805. To upset his choice of methods here, plaintiff must establish that . . . application of the 3-factor formula under §290.19, subd. 1(2)(b), has resulted in taxing such a substantial part of its income not attributable to Minnesota as to make the allocation grossly inequitable and invalid under the due-process clause of U. S. Const. Amend. XIV. On the other hand, if the evidence fairly supports the finding that application of the 3-factor formula has resulted in a reasonable reflection of its net income fairly apportionable to Minnesota, then even though this method may not have produced the most accurate or precise results, we have no choice but to approve it.
>
> Under the principle established in Butler Bros. v. McColgan, 315 U.S. 501, 62 S. Ct. 701, 86 L. Ed. 991, and adhered to in Western Auto Supply Co. v. Commr. of Taxation, 245 Minn. 346, 71 N.W. (2d) 797, and Crane Co. v. Carson, 191 Tenn. 353, 234 S.W. (2d) 644, certiorari denied, 340 U.S. 906, 71 S. Ct. 282, 95 L. ed. 655, we are of the opinion that the commissioner's determination to apply the 3-factor formula should be approved.
>
> * * *
>
> Basically, approval of the application of the 3-factor formula rests upon a conclusion expressed in most of the

> cited cases that *in multistate unitary operations the separate accounting method is inherently incapable of accurately allocating income*. Based upon the authorities cited and for the reasons expressed, we must uphold the commissioner's election to apply the 3-factor formula here. (Emphasis added) 258 Minn. at 530, 532.

The Minnesota Supreme Court also said in *Western Auto Supply*, 245 Minn. 346, 71 N.W. 2d 797 (1955):

> *The authorities, we believe, preponderate in holding that the separate accounting method is inherently incapable of accurately apportioning the income of a unitary business*. See analysis in Altman & Keesling, Allocation of Income in State Taxation, pp. 89 to 97. (Emphasis added) 245 Minn. at 359.

Both Minnesota and federal cases have consistently upheld the propriety and constitutionality of state taxation of multi-state unitary business on a formulary apportionment basis. *Butler Bros.* v. *McColgan*, 315 U.S. 501, 62 S. Ct. 701 (1942); *Western Auto Supply Co.* v. *Commissioner*, 245 Minn. 346, 71 N.W. 2d 797 (1955); *Walgreen Company* v. *Commissioner*, 258 Minn. 522, 104 N.W. 2d 714 (1960); *Maurice L. Rothschild & Co.* v. *Commissioner*, 270 Minn. 245, 133 N.W. 2d 524 (1965).

The reluctance of courts to favor separate accounting may in part be caused by a recognition that large multi-state businesses have many ways they can shift income from an operating entity to another and that, on balance, formulary apportionment may be the fairest way to determine the portion of net income that can be taxed by an individual state.

As the U. S. Supreme Court has noted:

> "The great majority of states imposing corporate income taxes apportion the total income of a corporation by application of a three-factor formula which gives equal weight to the geographical distribution of plant, payroll and sales." *General Motors Corp.* v. *District of Columbia*, 380 U.S. 553, 559, 85 S. Ct. 1156, 1160 (1965).

Although we do not accept the proposition that where accurate accounting of income is possible taxation on a unitary basis is

prohibited, this does not eliminate entirely the question of whether Appellant is conducting a "unitary" business, as that term is used in tax law. There must be a showing of an interrelationship between the business conducted in Minnesota and elsewhere. The evidence adduced at trial more than adequately supports our conclusion that there is this interrelationship. Our detailed Findings of Fact need not be repeated here.

One anomaly is that Appellant files on a unitary basis in some states and on a separate accounting basis in other states. Florida recently ruled that it should file corporate income taxes in that state on a unitary basis. *Associated Dry Goods Corporation, d/b/a Robinson's of Florida* v. *Department of Revenue of the State of Florida*, Pinellas County Circuit Court, Civil Dkt. No. 77-3290-19 (May 22, 1978), aff'd. without opin. 373 So. 2d 466 (Fla., 1979).

It seems obvious that Appellant is engaged in a single business. It owns and operates retail stores. It is one corporation with one board of directors elected by one group of shareholders. The board of directors have the final authority and control. No major local decisions such as an expansion can be made without the board's approval. The board, of course, can hire and fire the division managers (called presidents) and all other corporate officers.

In operating its business Appellant gives local division managers a great deal of authority. Most day-to-day operating and personnel decisions are made on the local division level. Most purchasing decisions are also made by the local buyers. The New York corporate office provides specialized assistance and coordination in purchasing and other areas but much of this participation is voluntary. A considerable volume of reports and comparative information is exchanged between the divisions and corporate headquarters. Any significant accumulations of cash are sent to New York and not retained locally and accounts receivable are assigned to New York and used for corporate financing.

There are uniform corporate policies regarding affirmative action guidelines, employee discounts, political contributions, executive loans, advances and travel. There is a common pension plan for

all employees and a single stock option and deferred compensation plan for executives. Even local charitable contributions must be reviewed and authorized by the board of directors in New York. All insurance is purchased through corporate headquarters. There is a generally standardized chart of accounts for accounting and bookkeeping purposes.

Typically, each division originally consisted of one or two stores in a marketing area. Associated acquired these existing stores through purchase and made no attempt to change their trade names or local identification. Examples are Goldwater's in Phoenix, Lord & Taylor in New York, J. W. Robinson Co. In Los Angeles and Powers in Minneapolis. Once acquired, additional stores might be added in surrounding suburbs and area shopping centers. In the case of Lord & Taylor, additional stores were also started in other cities. But the divisions continued to maintain their own image and sought a particular clientele through individual advertising and marketing strategies.

In summary, the corporation has encouraged decentralization in the daily operations of its retail store divisions while retaining ultimate authority and control over finances and division executives through its board of directors and top corporate officers headquartered in New York.

In our opinion, a decentralized style of management does not prevent us from finding that Associated is a unitary business for tax purposes. None of the divisions are separate corporations with separate shareholders and separate boards of directors controlling separate assets. All assets belong to Associated and ultimate authority and control is vested with Associated's shareholders and board of directors.

Associated is not conducting two separate distinct businesses as was the case in *Skelly Oil Co.* v. *Commissioner*, 269 Minn. 351, 131 N.W. 2d 632 (1964) where the Court found the taxpayer conducting an oil refining business and a petroleum marketing business.

The instant case is analogous to *Maurice L. Rothschild & Co.* v. *Commissioner*, 270 Minn. 245, 133 N.W. 2d 524 (1965), where the

taxpayer was in the retail store business with three stores in Chicago and three in the Twin Cities. Each store operated to a large extent independently of the other stores. The Minnesota stores had their own purchasing office, their own merchandise managers and buyers, and their own buying office in New York. Separate decisions were made by each store with respect to quantity and type of merchandise to be purchased. Any brand name carried, however, could not be changed without the approval of all officers in both Chicago and the Twin Cities. Each store maintained its own accounting records and handled its own acccounts receivable and payable and had its own bank account. Each store handled its own employment and personnel matters. The taxpayer also operated under two separate names, one in Minnesota and one in Illinois.

The Supreme Court in *Rothschild* affirmed the finding that the taxpayer was a unitary business. The Court said:

> It is our opinion that the commissioner acted properly within his discretion when he applied the three-factor formula. Butler Bros. v. McColgan, supra; Western Auto Supply Co. v. Commr. of Taxation, supra; Walgreen Co. v. Commr. of Taxation, supra. His determination was approved by the Board of Tax Appeals. In reviewing an order or determination of an administrative board, we will go no further than to determine whether it kept within its jurisdiction; whether it proceeded on a correct theory of law; whether its action was arbitrary, oppressive, or unreasonable, and represented its will and not its judgment; and whether the evidence was such that the board might reasonably make the order or determination it did. Western Auto Supply Co. v. Commr. of Taxation, supra. So reviewed, it is our opinion that the board's determination affirming the commissioner's application of the three-factor formula as properly and fairly reflecting the net income of the taxpayer assignable to Minnesota was justified by the evidence and must be affirmed. 270 Minn. at 256.

When the facts of the present case are compared with those in *Rothschild, supra*, Associated presents an even more compelling case for a finding of unitary business. The record is clear that the Powers division, together with the other Associated divisions and

the corporate headquarters, were in fact mutually beneficial to one another, and were in fact interdependent in the ultimate creation of profits channeled into one corporation owned by one group of shareholders. It appears to be a classic case of a multi-state unitary business under tax law.

Our decision affirms the Commissioner's order which uses the three-factor formula in apportioning income to Minnesota. We neither approve nor disapprove the allocating of income and expenses Appellant made in filing returns on a separate accounting basis. Even if separate accounting can accurately allocate all income and expenses a number of accounting judgments would be required. For instance, economies of size resulting in profits in other units should partially be attributed to all units.

It seems unfair for a corporation doing business in a number of states to pick and choose different methods of accounting in different states to obtain the most favorable tax treatment in each state. The apportionment of net income on the basis of sales, property and payroll, in the various states is the fairest method because these figures cannot easily be manipulated.

The recent U.S. Supreme court case of *F. W. Woolworth Co.* v. *Taxation and Revenue Dept. of New Mexico*, ___ U.S. ___, 102 S. Ct. 3128, 73 L. Ed. 2d 819 (June 29, 1982), cited by Appellant deals with the limited question of state taxation of dividend income from a foreign subsidiary corporation that had no unitary relationship with the parent corporation. We see no application to the case at hand.

The companion U. S. Supreme Court case of *ASARCO, Inc.* v. *Idaho Tax Commission*, ___ U.S. ___, 102 S. Ct. 3103, 73 L. Ed. 2d 787 (June 29, 1982), decided along with *Woolworth* deals with the taxability of dividend income received from other completely separate corporations, which were apparently not even wholly owned by ASARCO, and other income from transactions of a purely financial nature not connected with the ordinary business of ASARCO. The majority held this income was beyond the reach of state taxation, but there was a strong, well-reasoned dissent by three justices upholding the authority of the state to tax this income. Here

again, we do not consider the facts in *ASARCO* to be similar to the instant case.

The Order of the Commissioner should be affirmed.

EARL B. GUSTAFSON,
Court Administrator of the Tax Court,
State of Minnesota, does hereby certify
that the attached instrument is a true and
correct copy of the original on file and of
record in my office.
Dated this 2nd day of November, 1982
Eloise Erickson
Docket No. 2457

Appendix C

Order of the Tax Court of the State of Minnesota Denying Motion for Amended Findings of Fact and Conclusions of Law, December 27, 1982

STATE OF MINNESOTA

TAX COURT

Docket No. 2457

ASSOCIATED DRY GOODS CORPORATION,

Appellant,

vs.

THE COMMISSIONER OF REVENUE,

Appellee.

Order dated December 27, 1982.

The above entitled matter came on for hearing before the Court on December 10, 1982, on the Motion of Appellant for Amended Findings of Fact and Conclusions of Law, or, in the alternative, for a new trial.

Daniel T. Blomquist of Eastlund, Peterson and Solstad, Ltd., appeared on behalf of Appellant.

Paul R. Kempainen, Special Assistant Attorney General, appeared on behalf of Appellee.

Upon the files, records and proceedings herein, and after considering the arguments of counsel, the MOTION IS DENIED.

By the Court,

JOHN KNAPP
EARL B. GUSTAFSON
CARL A. JENSEN

Dated: December 27, 1982

Appendix D

Order of Minnesota Department of Revenue Determining Tax Liability, April 7, 1977

MINNESOTA DEPARTMENT OF REVENUE
INCOME TAX DIVISION
CENTENNIAL OFFICE BUILDING
ST. PAUL, MINNESOTA 55145

☒ Proposed Changes in Tax Liability
☒ Order Determining Tax Liability

Proposal Period—From: 3-1-77 To: 3-31-77
Order Date: 4-7-77
Minnesota Identification No.: B-8793665

Powers Dry Goods Co. Division of
Associated Dry Goods Corporation
417 Fifth Avenue
New York, NY 10016

An examination of your income tax return for the tax period(s) indicated below discloses certain adjustment(s) which result in a change to your tax liability.

This form is a combination of Proposed Changes in Tax Liability for the period indicated above and an Order Determining Tax Liability effective on the date indicated above. If the Proposed Changes in Tax Liability block is checked, and you wish to protest the adjustments, file a written protest with the Income Tax Division during the proposal period indicated. Return this form with your written protest but keep the attached audit report. Instructions for filing a protest are on the reverse side of copy A of this form. If you have any questions please write to the address in the heading of this form.

If only the Order Determining Tax Liability block above is checked, or the proposal period has expired and you wish to protest the adjustments you must appeal to the Tax Court within thirty (30) days of the Order date above. Do not file an appeal with the Tax Court before the Order date indicated. Instructions for filing an appeal with the Tax Court may be obtained from that office located in Room 190B, Centennial Office Building, St. Paul, Minnesota 55145.

Appendix D

Department of Revenue Order

If this Proposal and/or Order results in an amount of additional tax being due, payment must be made not later than thirty (30) days from the date of this Order. Failure to submit payment will result in a penalty of five percent of the unpaid balance being assessed for returns due to be filed before July 1, 1975 or a penalty of ten percent for later year returns. Interest will continue to accrue on the unpaid tax and penalty until payment is received. If payment has been made, please disregard this request for payment.

Overpayments may be credited by the Commissioner to other liabilities you may owe. Any net overpayment together with appropriate interest will be refunded to you in approximately thirty (30) days.

GEORGE W. WINTER
George W. Winter
Deputy Commissioner of Revenue
(612) 296-3441

Computation of Liability Change

Tax Period	*Account Number*	*Additional or Reduction*	*Tax*	*Penalty*	*Interest*	*Total*
2-3-68	114543 KPR WJG	Additional Tax	$ 7,404.74	$	$ 3,784.32	$ 11,189.06
2-1-69	139887 KPR WJG	Additional Tax	42,599.16		19,994.75	62,593.91
1-31-70	166130 KPR WJG	Reduction in Tax	38,857.29		14,940.36	53,797.65
1-30-71	192986 KPR WJG	Reduction in Tax	9,337.63		3,174.92	12,532.55
1-29-72	20307 KPR WJG	Additional Tax	12,443.44		3,607.23	16,050.67
2-3-73	49617 KPR WJG	Reduction in Tax	20,028.60		4,401.90	24,430.50
2-2-74	80913 KPR WJG	Additional Tax	21,951.12		3,732.88	25,684.00
2-1-75	111398 KPR WJG	Additional Tax	86,706.20		11,024.74	97,730.94
1-31-76	143579 KPR WJG	Additional Tax	145,679.00		9,690.64	155,369.64
					Net (Additional)	$277,857.52

☒ See attached audit report for explanation of adjustment.

Appendix E

Order of Minnesota Department of Revenue Determining Tax Liability, May 17, 1977

MINNESOTA DEPARTMENT OF REVENUE
INCOME TAX DIVISION
CENTENNIAL OFFICE BUILDING
ST. PAUL, MINNESOTA 55145

☐ Proposed Changes in Tax Liability
☒ Order Determining Tax Liability

Order Date: 5-17-77
Minnesota Identification No.: B-8793665

Powers Dry Goods Co. Division of
Associated Dry Goods Corporation
417 Fifth Avenue
New York, NY 10016

An examination of your income tax return for the tax period(s) indicated below discloses certain adjustment(s) which result in a change to your tax liability.

This form is a combination of Proposed Changes in Tax Liability for the period indicated above and an Order Determining Tax Liability effective on the date indicated above. If the Proposed Changes in Tax Liability block is checked, and you wish to protest the adjustments, file a written protest with the Income Tax Division during the proposal period indicated. Return this form with your written protest but keep the attached audit report. Instructions for filing a protest are on the reverse side of copy A of this form. If you have any questions please write to the address in the heading of this form.

If only the Order Determining Tax Liability block above is checked, or the proposal period has expired and you wish to protest the adjustments you must appeal to the Tax Court within thirty (30) days of the Order date above. Do not file an appeal with the Tax Court before the Order date indicated. Instructions for filing an appeal with the Tax Court may be obtained from that office located in Room 190B, Centennial Office Building, St. Paul, Minnesota 55145.

Appendix E

Department of Revenue Order

If this Proposal and/or Order results in an amount of additional tax being due, payment must be made not later than thirty (30) days from the date of this Order. Failure to submit payment will result in a penalty of five percent of the unpaid balance being assessed for returns due to be filed before July 1, 1975 or a penalty of ten percent for later year returns. Interest will continue to accrue on the unpaid tax and penalty until payment is received. If payment has been made, please disregard this request for payment.

Overpayments may be credited by the Commissioner to other liabilities you may owe. Any net overpayment together with appropriate interest will be refunded to you in approximately thirty (30) days.

GEORGE W. WINTER
George W. Winter
Deputy Commissioner of Revenue
(612) 296-3441

Computation of Liability Change

Tax Period	*Account Number*	*Additional or Reduction*	*Tax*	*Penalty*	*Interest*	*Total*
2-3-68	114543 KPR WJG	Additional Tax	$ 7,404.74	$	$ 3,841.52	$ 11,246.26
2-1-69	139887 KPR WJG	Additional Tax	$ 42,599.16		20,323.87	62,923.03
1-31-70	166130 KPR WJG	Reduction in Tax	$ 38,857.29		15,342.77	(54,200.06)
1-30-71	192986 KPR WJG	Reduction in Tax	$ 9,357.63		3,271.82	(12,629.45)
1-29-72	20307 KPR WJG	Additional Tax	$ 12,443.44		3,703.36	16,146.80
2-3-73	49617 KPR WJG	Reduction in Tax	$ 20,028.60		4,609.31	(24,637.91)
2-2-74	80913 KPR WJG	Additional Tax	$ 21,951.12		3,902.47	25,853.59
2-1-75	111398 KPR WJG	Additional Tax	$ 86,706.20		11,806.27	98,512.47
1-31-76	143579 KPR WJG	Additional Tax	$145,679.00		11,191.33	156,870.33
			$248,540.14		$31,544.92	
					Net (Additional)	$280,085.06

☒ See audit report previously sent March 1, 1977.

Appendix F

MINNESOTA STATUTES

Section 290.17 (3) and (4); and 290.19, subd. 1(2)(a).

§ 290.17. Gross income allocation to state

. . . (3) Income derived from carrying on a trade or business, including in the case of a business owned by natural persons, the income imputable to the owner for his services and the use of his property therein, shall be assigned to this state if the trade or business is conducted wholly within this state, and to other states if conducted wholly without this state. This provision shall not apply to business income subject to the provisions of clause (1);

(4) When a trade or business is carried on partly within and partly without this state, the entire income derived from such trade or business, including income from intangible property employed in such business and including, in the case of a business owned by natural persons, the income imputable to the owner for his services and the use of his property therein, shall be governed, except as otherwise provided in Sections 290.35 and 290.36, by the provisions of Section 290.19, notwithstanding any provisions of this section to the contrary. This shall not apply to business income subject to the provisions of clause (1)[1].

§ 290.19. Net income; allocation to state, methods

Subdivision 1. [illegible]ation, business conducted partly within state; apporti[illegible] The taxable net income from a trade or business carried on p[illegible]thin and partly without this state shall be computed by deducting from the gross income of such business, wherever derived, deductions of the kind permitted by section 290.09, so far as connected with or allocable against the production

---

[1] These subdivisions are here reprinted as they appeared at all times pertinent to this case. In 1973, Paragraph 4 was amended to add provisions not relevant here. Laws of Minnesota 1973, Chapter 650, Article 4, Section 4.

or receipt of such income. The remaining net income shall be apportioned to Minnesota as follows:

. . . (2) (a) In all other cases the remainder shall be apportioned to Minnesota on the basis of the percentage obtained by taking the arithmetical average of the following three percentages:

(1) The percentage which the sales, gross earnings, or receipts from business operations, in whole or in part, within this state bear to the total sales, gross earnings, or receipts from business operations wherever conducted;

(2) The percentage which the total tangible property, real, personal, and mixed, owned or rented, and used by the taxpayer in this state during the tax period in connection with such trade or business is of the total tangible property, real, personal, or mixed, wherever located, owned, or rented, and used by the taxpayer in connection with such trade or business during the tax period; and

(3) The percentage which the taxpayer's total payrolls paid or incurred in this state or paid in respect to labor performed in this state in connection with such trade or business is of the taxpayer's total payrolls paid or incurred in connection with such entire trade or business;

(4) The percentage of such remainder to be assigned to this state shall not be in excess of the sum of the following percentages: 70 percent of the percentage determined under clause (2)(a)(1), 15 percent of the percentage determined under clause (2)(a)(2), and 15 percent of the percentage determined under clause (2)(a)(3).

Appendix G

Excerpt from Trial Testimony Before the Minnesota Tax Court, October 12, 1981

STATE OF MINNESOTA
COUNTY OF HENNEPIN } IN TAX COURT

ASSOCIATED DRY GOODS CORPORATION,
Petitioner,

File No. 2457

vs.

COMMISSIONER OF REVENUE,
Respondent.

TRANSCRIPT OF PROCEEDINGS of the trial held relative to the above matter, before the Honorable Earl B. Gustafson, on the 12th day of October, 1981, commencing at approximately 10:00 o'clock in the morning, at 444 Lafayette Road, in the City of St. Paul, Minnesota.

TESTIMONY OF STANLEY C. HOLLANDER

* * *

Q. Now, there has been a document put in evidence here, it's Joint Exhibit 18, Professor, and I will hand you the Court copy, and just ask you to take that, please?

A. Surely.

Q. That is a sheaf of documents or memoranda with an Index on the front that appears to cover a 17-year period that consists of, at least the Index does, of 23 items—I think there are fewer, actually, in the exhibit—so-called POLICY STATEMENT MEMORANDA. Several of these, according to previous testimony, refer to matters having national scope, such as federal laws and regulations concerning SEC matters, truth and lending matters, customs matters, political contributions, and so forth. I would ask you, would a headquarters office of an independent

retail trade association, for example, normally inform its members on matters of national application?

A. Yes, sir.

Q. Would doing so indicate an attempt by that headquarters office to centrally control the merchandising and operational aspects of the various members?

A. No.

Q. Could you equate this Exhibit 18, just in size alone, I mean numbers of documents, with the policy directives and mandates that issue from the central office of a chain store for purposes of central control?

A. I would say this would be closer to the weekly supply of documents as well.

Q. In sheer numbers—

A. In sheer numbers of size, yes.

Q. What would the situation be in a chain store so far as the flow of policies and directives over a 17-year period?

A. It would be enormous, a tremendous number of messages of one kind or another, either several shelves of looseleaf binders of file cabinets, and that sort of thing.

Q. What would they concern, generally, what types of matters, could you enumerate a few?

A. Well, surely every detail of how many employees would have to be in the store before the doors could be allowed to open and customers admitted; possibly even what sources of polish were to be used on fixtures of one kind or another; instructions to participate in particular merchandise promotions; reports that would be filed on the sale of specific items; attitudes towards requests for, local requests for contributions; instructions to the managers as to participation in local organizations; just about everything.

Appendix G

Testimony, Minnesota Tax Court

Q. Am I correct in assuming then that the central control of a chain store operation is not based on occasional informal suggestions?

A. No way.

Transcript pp. 47-49.

Appendix H

Excerpt from Oral Argument Before the United States Supreme Court in *Exxon Corp. v. Wisconsin Department of Revenue*[1], March 18, 1980

ORAL ARGUMENT OF GERALD S. WILCOX, ESQ., ASSISTANT ATTORNEY GENERAL OF WISCONSIN, ON BEHALF OF THE APPELLEE

* * *

QUESTION: Mr. Wilcox, before you sit down, is there anything in the Wisconsin statute that would prevent Wisconsin—let me give you a—assume for a second that the marketing division was the really profitable one within the company, that their accounting showed that, and it might therefore be in Wisconsin's interests to treat the marketing operation as a separate unitary business, as I think the Department of Revenue did at one stage of this proceeding. Is there anything in the statute, the Wisconsin statute, that would prevent Wisconsin from saying, "Well, we have decided to define unitary just to include the marketing operation"?

MR. WILCOX: I don't think the statute prevents that. I think that would be inconsistent. Wisconsin never treated the market separate. Initially, what—

QUESTION: Didn't the taxing authority treat marketing separate in this case?

MR. WILCOX: What initially happened is Exxon filed tax returns on the basis of—

QUESTION: They said just Wisconsin, and then the first round didn't they just expand the—

MR. WILCOX: Oh, you mean the Tax Appeals Commission.

QUESTION: Yes.

MR. WILCOX: Okay. The Department of Revenue, my client, did not.

---

[1] 447 U.S. 207 (1980).

Appendix H

Oral Argument, Exxon Corp.

QUESTION: I'm sorry. Somewhere along the line then.

MR. WILCOX: Initially, yes, they did divide up Exxon into essentially three unitary businesses.

QUESTION: Isn't it fairly reasonable to assume that had that been the most profitable division of the company, that that might have stuck?

MR. WILCOX: You are saying that we might not have appealed?

QUESTION: Yes.

MR. WILCOX: I think that might be true. I don't think that would have been right, but that might have been true, yes.

117 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES 777-78 (1981).

Appendix I

Excerpt from Trial Testimony Before Pinellas County, Florida Circuit Court in *Associated Dry Goods Corp. v. Department of Revenue*, May, 1978

IN THE CIRCUIT COURT FOR PINELLAS COUNTY, FLORIDA
CIRCUIT CIVIL NO. 77-3290-19

ASSOCIATED DRY GOODS CORPORATION, a Virginia corporation, d/b/a ROBINSON'S OF FLORIDA,

Plaintiff,

vs.

DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA, and J. ED. STRAUGHN (HARRY L. COE), Executive Director of the DEPARTMENT OF REVENUE,

Defendants.

Cross-Examination of Wayne Stephenson, Witness for Defendants

* * *

BY MR. CRUMP:

Q. Mr. Stephenson, can you outline the factors which—let me ask you, first of all, whether you were familiar with the factors that are considered in the determination of whether the corporation should file a separate or formulary accounting?

A. Yes.

Appendix I

Testimony, Pinellas County, Florida Circuit Court

Q. Could you tell us generally what those factors are?

A. Generally, if enough information is provided on the return the taxpayer files, we would, at that time, consider whether or not to accept or deny separate accounting, and in making the determination, if there is no—or would be no tax consequence one way or the other, we would, in essence, accept a separate accounting, a separate accounting as filed by the taxpayer.

Q. In other words—

A. We would not pursue whether or not the separate accounting would be the correct way the taxpayer should have filed.

Q. What you are saying, you are not going to waste time of the audit staff pursuing an issue that would be fruitless in terms of revenue?

A. Right.

Q. And this would be the case, even though in an academic sense, you might disagree?

A. Correct.

MR. CRUMP: No further questions.

Transcript pp. 490-91.

Office - Supreme Court, U S
FILED
JUL 13 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-2099

IN THE

Supreme Court of the United States

October Term, 1984

ASSOCIATED DRY GOODS CORPORATION,
Petitioner,

vs.

THE COMMISSIONER OF REVENUE OF
THE STATE OF MINNESOTA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MINNESOTA

RESPONDENT'S BRIEF IN OPPOSITION

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the decision of the Minnesota Supreme Court, affirming the Minnesota Tax Court's finding that Associated Dry Goods Corporation is a unitary business carried on within and without the State of Minnesota, was based upon correct constitutional standards and was within the realm of permissible judgment.

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IN THE

Supreme Court of the United States

October Term, 1984

No. 83-2099

ASSOCIATED DRY GOODS CORPORATION,
Petitioner,

vs.

THE COMMISSIONER OF REVENUE OF THE STATE OF MINNESOTA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, the Commissioner of Revenue for the State of Minnesota, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Minnesota Supreme Court's opinion in this case. That opinion is reported at 347 N.W.2d 36 (Minn., 1984).

STATEMENT OF THE CASE

This is a Minnesota corporate income tax case involving the question of whether Associated Dry Goods Corporation (hereinafter "Associated") was carrying on a unitary business within and without Minnesota, so that its income was apportionable according to Minnesota's three-factor formula.[1] The facts of this case were extensively developed through pretrial discovery and at a four-day trial held before the three-judge Minnesota Tax Court, sitting *en banc*. After trial the Tax Court unanimously adopted detailed Findings of Fact which are reprinted in the appendix to the petition herein. (A. 12a-26a).[2]

Those Findings show that Associated is a Virginia corporation with its principal office and corporate headquarters in New York City, and which carries on its retail merchandising business in a number of states through corporate divisions rather than subsidiary corporations. (Findings No. 1 and 3). Associated is qualified to do business in Minnesota, where it owns and operates several retail stores through its Powers Dry Goods division. (Finding No. 4). Associated is a single corporation, with a single board of directors and a single

---

[1] This is the second time Associated has attempted to bring the same issue up on petition for writ of certiorari. In *Associated Dry Goods Corporation v. Commissioner of Taxation of Minnesota*, 306 Minn. 532, 235 N.W.2d 821 (1975), *cert. denied* 425 U.S. 999 (1976), it was determined that Associated was carrying on such a unitary business during the taxable years immediately preceding those at issue in this case.

[2] Throughout this brief the abbreviation "A.—" is a reference to the Appendix filed with the Petition. The abbreviation "Finding No. —" is a reference to the Minnesota Tax Court's Findings of Fact.

group of corporate officers who are responsible to its shareholders for the management of the business. (Finding No. 2).

While day-to-day management of each division is decentralized to a division president and a division treasurer, these positions are filled by the board of directors (Finding No. 12), and all division presidents report to the corporate officers in New York who are charged with their supervision. (Finding No. 13). In addition, some division presidents hold the title "regional executive vice-president" and have responsibility over other divisions (*Id.*); while other division presidents are often called to do work of a corporate-wide nature. (Finding No. 16).

Associated holds regular meetings between its corporate and divisional officers to discuss and resolve common problems, including two presidents' meetings each year, an annual treasurers' meeting, and an annual personnel managers' meeting. (Findings No. 22-25). Associated frequently utilizes its key personnel on a corporate-wide basis by offering them transfer promotions from one division to another, and from divisional to corporate positions. (Finding No. 17).

The store divisions are required to submit regular reports to the corporate office in New York on a daily, weekly, monthly, quarterly, seasonal and annual basis. (Finding No. 26). Many of these reports are compiled together on a comparative basis and then distributed back to the divisions for use as tools in planning more efficient day-to-day operations. (Findings No. 27 and 28). In addition, Associated's board of directors regularly reviews these divisional reports and also approves all divisional capital budgets, seasonal budgets, expansion plans, and contributions budgets. (Findings No. 11, 45 and 50).

The corporate treasurer in New York has total responsibility for Associated's accounting and financial matters, in-

cluding the making of loans, advancing funds to the divisions and withdrawing funds from the divisions. (Finding No. 18). All capital for store expansion comes from the retained earnings of the corporation as a whole, or from other corporate-wide financing. (Finding No. 45). Preparation of all the corporation's state and federal income tax returns is done at New York under the supervision of the corporation's tax manager. (Findings No. 18 and 56).

In the functional area of buying inventory Associated's divisional buyers are formed into corporate-wide buying committees under the direction and control of the corporation's Market Research Division. (Findings No. 36, 37 and 42). Thus, while local buyers make their own buying decisions (Finding No. 35), the corporate committees and Market Research Division provide valuable assistance to them in comparing and exchanging information, surveying the markets and engaging in mutually beneficial group purchases of common items of merchandise. (Findings No. 36 and 37). Associated also has a London based, wholly-owned subsidiary, Associated Dry Goods (U.K.) Ltd., to conduct a foreign market research operation very similar to Associated's Market Research Division in New York. (Findings No. 39 and 40).

Associated buys all its insurance on a centralized basis through the corporate headquarters. (Finding No. 49). It also maintains a common pension plan for all divisions (Finding No. 53), a corporate-wide employee discount policy (Finding No. 54), and a mandatory retirement age policy (Finding No. 55).

Finally, the Minnesota Tax Court found that Associated's store divisions are financially interdependent in the sense that all divisions contribute to Associated's earnings, and each division's surplus earnings are sent to the corporate office

where they are commingled with other corporate funds, out of which Associated then transfers funds back to the divisions on an as needed basis for day-to-day operations. (Finding No. 31). In 1969, Associated created a wholly owned finance subsidiary, Associated Dry Goods Credit Corporation, to ease the financing of corporate operations through the purchase of accounts receivable from the store divisions. (Finding No. 52). The Credit Corporation uses these as security in borrowing funds, which are then loaned back to Associated for use in financing both its capital projects and its day-to-day division operations. (*Id.*).

For the taxable years at issue herein (1967-1975) Associated filed its Minnesota corporate income tax returns on a separate accounting basis. The respondent Commissioner determined that the three-factor formula should have been used, and on May 17, 1977, issued an order assessing additional tax and interest against Associated in a total amount of $280,085.06. Associated appealed and trial was held before the Minnesota Tax Court on October 7-12, 1981. After briefs were filed the Tax Court issued its unanimous Order, dated November 2, 1982, affirming the Commissioner's Order. Associated took a further appeal to the Minnesota Supreme Court, which affirmed the Tax Court's decision on March 23, 1984.

REASONS FOR DENYING THE WRIT

I. NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED WHERE THE MINNESOTA SUPREME COURT APPLIED SETTLED LEGAL STANDARDS AND WHERE, UNDER THE FACTS, ITS DECISION WAS CLEARLY WITHIN THE REALM OF PERMISSIBLE JUDGMENT.

Over the past four years this Court has issued no less than five opinions on the subject of the unitary business principle in state taxation of multi-jurisdictional corporations. In the most recent of these, *Container Corporation of America v. Franchise Tax Board*, —— U.S. ——, 103 S.Ct. 2933 (1983), this Court concluded that: "The legal principles defining the constitutional limits on the unitary business principle are now well established." *Id.*, 103 S.Ct. at 2946. But while the legal standards are thus well settled, the factual background of each case has been, and will continue to be, as varied and different as the American economy itself. Factual situations can range from the sparsity of facts in *F.W. Woolworth Co. v. Taxation and Revenue Department*, 458 U.S. 354 (1982), where it was noted that "the State did a very poor job of inquiring into and developing the facts," *Id.* at 360; to the more or less comprehensive stipulations of fact entered into in such cases as *Container Corp., supra*, and *Butler Bros. v. McColgan*, 315 U.S. 501 (1942).

Because of these factual variations, and also no doubt because of the long established principle that this Court will not review decisions of state courts upon questions of fact that are supported by substantial evidence,[3] this Court has recognized

---

[3] *General Motors Corp. v. Washington*, 377 U.S. 436, 441-442 (1964); *Fry Roofing Co. v. Wood*, 344 U.S. 157, 160 (1952); *Grayson v. Harris*, 267 U.S. 352, 357-358 (1925); *Pure Oil Co. v. Minnesota*, 248 U.S. 158, 164 (1918).

that in this particular area of jurisprudence "not every claim that a state court erred in making a unitary business finding will pose a substantial federal question." *Container Corp.*, 103 S.Ct. at 2946, n. 14.

This is exactly the situation we have in the present petition, as the foregoing Statement of the Case clearly indicates.

In *Container Corp.*, this Court established a standard of review for future cases, saying that:

> It will do the cause of legal certainty little good if this Court turns every colorable claim that a state court erred in a particular application of those principles into a *de novo* adjudication, whose unintended nuances would then spawn further litigation and an avalanche of criminal comment. *Rather, our task must be to determine whether the state court applied the correct standards to the case; and if it did, whether its judgment "was within the realm of permissible judgment."*

103 S.Ct. at 2946. (Emphasis added).

The decision below more than adequately meets this standard of review. The Minnesota Supreme Court expressly reviewed and adopted the legal principles established by this Court. For example, it said in its opinion that:

> [A] multistate enterprise may be characterized as a unitary business where there are "contributions to income resulting from functional integration, centralization of management, and economies of scale." *Mobil Oil Corp. v. Commissioner of Taxes of Vermont*, 445 U.S. 425, 438 (1980).

347 N.W.2d at 39. (A. 5a).

The Minnesota Supreme Court then correctly applied those principles to the facts of this case, when it wrote, *inter alia*, that in Associated's case:

> [T]here is evidence of centralization of management: there is one set of stockholders, officers and directors to perform the kind of executive oversight that goes beyond "potential" to some degree of "implicit" control. *Container Corp.*, 103 S.Ct. at 2946-47 n. 16. There is also evidence of functional integration: for example, the sharing of information, some group buying, periodic reports and conferences, preparation of tax returns at the corporate level, centralized purchasing of casualty insurance, one pension plan, and various consultant services. Finally, there is evidence of economies of scale: funds are commingled and used to fund capital improvements and for loans back to the divisions; accounts receivable are purchased from the division by a New York subsidiary.

347 N.W.2d at 42. (A. 9a-10a).

Clearly, these factually based conclusions are well "within the realm of permissible judgment." *See* the statement of unitary factors listed by this Court in *Container Corp., supra*, 103 S.Ct. at 2947-2948.

In its petition for writ of certiorari Associated makes no serious claim that the factual findings of the courts below are inaccurate. Indeed, Associated implicitly concedes that they are supported by substantial evidence. Pet. for Writ, p. 12.[4] Nor do we understand Associated to be arguing that the Minnesota Court adopted the wrong legal principles. Instead, Associated argues that its case is "on all fours" with the facts

---

[4]The abbreviation "Pet. for Writ ——" refers to Associated's Petition for Writ of Certiorari.

in *F.W. Woolworth, supra,* (*see* Pet. for Writ, p. 5), and that the judgment of the Minnesota Supreme Court is somehow wrong for disagreeing with them on this point. Pet. for Writ, p. 11.

In fact, *F.W. Woolworth,* is readily distinguishable from the case at hand, as we point out in Part II of this brief, *infra.* But more importantly, it must be remembered that the *F.W. Woolworth* case broke no new ground in formulating the unitary business principle. This Court did not, as Associated seems to suggest, create some new exception from the unitary principle for retail merchandisers. Instead, this Court simply applied recognized law to the unique record in that case.

The leading case in this area remains *Butler Bros. v. McColgan,* 315 U.S. 501 (1942). In that case, the taxpayer was also a single corporation operating distributing houses as separate divisions in several different states. Like Associated, each distributing house was to a great extent operated independently of the others, but there was centralized purchasing of goods through a central buying division. This fact alone was held to be sufficient ground for treating the taxpayer as a unitary business. 315 U.S. at 508.

Inasmuch as Associated's group buying, organized and coordinated as it is through corporate-wide buying committees and the New York-based Market Research Division (Findings No. 36-37 and 41-42), is substantially no different from the central buying in *Butler Bros., supra,* it is therefore clear that Associated is also a unitary business. When this fact is combined with the numerous other facts pointing to the unitary nature of Associated's business, as outlined in our Statement of the Case, *supra,* it becomes obvious that there simply is no substantial federal issue presented in this case. Instead, the *Butler Bros.* decision continues to provide a clear statement of the applicable law.

II. THE DECISION OF THE MINNESOTA SUPREME COURT DOES NOT CONFLICT WITH THIS COURT'S DECISION IN THE *F.W. WOOLWORTH* CASE, BECAUSE THE TWO CASES ARE DISTINGUISHABLE.

In its petition Associated relies chiefly upon alleged comparisons with the situation in *F.W. Woolworth Co. v. Taxation and Revenue Dept.*, 458 U.S. 354 (1982); but that case is readily distinguishable from the case at hand.

In contrast to the extensive record developed by the State of Minnesota regarding Associated's numerous unitary aspects, it was observed in *F.W. Woolworth* by both the state court and the United States Supreme Court that the State of New Mexico "[r]egrettably, . . . did a very poor job of inquiring into and developing the facts." 458 U.S. at 360, citing the New Mexico Supreme Court in 95 N.M. at 524, 624 P.2d at 33. Because of this paucity of evidence, it is not surprising that this Court failed to find the three factors of profitability necessary for a unitary business (i.e. functional integration, centralization of management and economies of scale) in *Woolworth's* relations with its overseas subsidiaries.

In the present case, there is no such problem.

The evidence of functional integration by Associated is extensive and far greater than in the *Woolworth* case. Unlike the totally decentralized buying policies of *Woolworth*, 458 U.S. at 365, Associated maintains a Market Research Division for the express purpose of coordinating and organizing store buyers into corporate-wide buying committees for mutually beneficial information exchanges and group purchasing. (Findings No. 36-37 and 41-42). The foreign buying by Associated's divisions was done on a similarly cooperative and group buying basis. (Findings No. 39-40).

In *F.W.Woolworth*, "each subsidiary was responsible for obtaining its own financing from sources other than the parent." 458 U.S. at 367. In contrast, Associated's individual divisions are completely dependent upon the corporate headquarters for financing not only capital projects, but also for day-to-day operations. (Findings No. 31, 32 and 52). All this is coordinated and supervised by Associated's corporate treasurer in New York. (Finding No. 18).

Other examples of functional integration present in this case, but not in *F.W. Woolworth*, are the centralized purchasing, at reduced group rates, of insurance (Finding No. 49); the use by some store divisions of regional computer banks located at other store divisions (A. 8a); and the corporate approval, financing and aid in the building of new divisional stores (Findings No. 45-46).

In centralization of management, Associated's board and officers took an active role in the actual management of many aspects of its divisions' business. (Findings No. 10, 11, 13 and 29). This contrasts with *F.W. Woolworth*, where it was found that the parent had "no department or section, as such, devoted to overseeing the foreign subsidiary operations." 458 U.S. at 367. Also unlike *F.W. Woolworth*, where "[t]here was no 'policy of the parent that all of the managers of all the operations get together periodically to discuss the overall *Woolworth* operations'," 458 U.S. at 368, Associated has an established policy of regularly holding two divisional presidents' meetings each year, as well as annual treasurers' and personnel managers' meetings. (Findings No. 22-25).

Associated's centralized management control is exercised through an extensive system of daily, weekly, monthly, quarterly, seasonal and annual reports, plus semiannual sales plans (Findings No. 10 and 26), as well as transfers of key person-

nel between divisions and promotions to corporate positions (Findings No. 7 and 17). This contrasts sharply with *Woolworth*, which exercised only "the type of occasional oversight . . . that any parent gives to an investment in a subsidiary." 458 U.S. at 369. Also unlike *Woolworth*, 458 U.S. at 368, Associated has a corporate tax manager who prepares in New York all of its state and federal tax returns. (Finding No. 56).

This is by no means an exhaustive list of the differences between the two cases. But it serves to illustrate that, on the basis of factual evidence alone, there is a great deal of difference between *F.W. Woolworth* and the case at hand. While there was little, if any, evidence of "functional integration, centralization of management and economies of scale" in *F.W. Woolworth*, all three factors have been found to exist in the case at hand.

III. PETITIONER'S CONTENTION THAT MINNESOTA IGNORES CONSTITUTIONAL STANDARDS IN A SEARCH FOR GREATER REVENUE IS TOTALLY UNFOUNDED.

The second part of Associated's petition (pp. 12-15) is devoted to the old complaint that states really do not care which method of taxation (formulary apportionment or separate accounting) is used just so long as it garners the most revenue. In the first place, this is a strange argument coming from a corporation which itself chooses to file income tax returns in some states on a unitary apportionment basis and in other states on a separate accounting basis. (Finding No. 57). As the Minnesota Tax Court aptly mentioned in its order: "It seems unfair for a corporation doing business in a number of states to pick and choose different methods of accounting

in different states to obtain the most favorable tax treatment in each state." (A. 33a).

Secondly, whatever may be the practice in some states, Minnesota clearly does not engage in the practice of switching back and forth between tax accounting methods. In fact, in the instant case the additional tax assessed by Minnesota was for only six of the nine years in issue. For three of the years in issue (1970, 1971 and 1973) the application of the unitary three-factor formula by the Commissioner actually resulted in a reduction in the tax originally reported by Associated on its returns. (Finding No. 58).

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari herein should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1984

ASSOCIATED DRY GOODS CORPORATION,

Petitioner,

v.

THE COMMISSIONER OF REVENUE OF THE STATE OF MINNESOTA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION

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September 19, 1984

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Petitioner, Associated Dry Goods Corporation ("Associated"), respectively submits a reply brief to respondent's brief in opposition to the petitioner's petition for writ of certiorari and requests that this Court grant the writ or direct the Minnesota Supreme Court to decide the case in accordance with the precedent of this Court. The opinion of the Minnesota Supreme Court is reported at 347 N.W.2d 36 (Minn. 1984).

I.

Where the precedents of this Court are not followed, a substantial federal question exists.

Petitioner requests the issuance of a writ of certiorari because the Minnesota Court has not followed the precedents of this

Court, and in this case such failure presents a substantial federal question.

The Minnesota Court had before it a clear precedent in *F. W. Woolworth Co.* v. *Commissioner of Taxation and Revenue*, 458 U.S. 354 (1982).

Instead it applied *Container Corporation* v. *Franchise Tax Board*, 103 S. Ct. 2933 (1983) and *Butler Brothers* v. *McColgan*, 315 U.S. 501 (1942).

The tables contained in petitioner's petition on pages 6-8 demonstrate the striking similarity between the facts of the *Woolworth* situation and the present Associated case and the similarity in facts discloses a similarity in legal principles.

Legal principles underlying facts are more dispositive than the facts themselves and petitioner is not blindly pointing to the similar facts in *Woolworth* without regard to the underlying principles. The underlying principle of *Woolworth* is that the economic realities of a non-integrated horizontal retail business do not provide the essential nexus which permits a state to accomplish the extraordinary extension of its powers to claim income arising out of other states in calculating the tax it endeavors to collect.

The incidents of corporate and organizational unity of Associated which respondent cites and which are summarized on page 9 of the petition are in quantity insignificant compared with the fundamental separateness of Powers, but, more important, are of a quality irrelevant to tax considerations. In their quantitative inadequacy and qualitative irrelevance they do not provide the essential nexus. As this Court stated in *Woolworth*, our cases demand more.

In terms of revenue flows, it may be asked whether it really makes any difference that the factors relied on by the Minnesota Court exist, or for that matter do not exist.

A retail ownership group like Associated operates discrete individual stores in different states with revenue and expense patterns unique to each of those states.

The point is that the revenue and expense issues of Powers operating only in Minnesota are inextricably Minnesota based - and so the Minnesota Court concluded:

> "[Powers] receives all of its income from sales at its stores [all in Minnesota]-i.e., it receives no income from other Associated Dry Goods divisions or subsidiaries."

See Petition, Appendix A, p. 8a.

Yet in spite of this conclusion the Minnesota Court found Powers to be unitary with other Associated divisions and justified the finding on the basis of *Container Corp.*, a case relating to a vertically integrated manufacturer, and *Butler Bros.*, a case relating to a vertically integrated wholesaler.

Petitioner urges that *Woolworth* be reasserted in a way to make clear that the necessary nexus of unitariness must relate to tax incidents and the factors which are the components of a tax result.

II.

A substantial federal question exists when constitutional standards are not scrupulously applied at the point of first contact of the citizen with the law.

Because petitioner files in some states, other than Minnesota, on an apportionment basis, where state law and the facts of petitioner's local operations may be different, respondent implies that it ill behooves petitioner to suggest that the State of Minnesota and its courts have ignored essential facts in determining that petitioner's income must be apportioned here as well. Respondent would thus turn the argument to considerations of "fairness," a tit-for-tat approach, regardless of fact and law. Indeed, the Minnesota Tax Court also interjects similar notions with its observation: "It seems unfair for a corporation . . . to obtain the most favorable tax treatment in each state." See Respondent's Brief in Opposition, pp. 12-13. Far from being "unfair," however, it is the legal right of petitioner, as well as its duty to its shareholders, to determine and assert its various tax liabilities in

every way most favorable to it. As Justice Frankfurter said in notable dicta:

> "As to the astuteness of taxpayers in ordering their affairs so as to minimize taxes, we have said that 'the very meaning of a line in the law is that you intentionally may go as close to it as you can if you do not pass it.' [Holmes, Justice] . . . This is so because 'nobody owes any public duty to pay more than the law demands: taxes are enforced exactions, not voluntary contributions.' Learned Hand, Circuit Judge. . . ."

Atlantic Coast Line Railroad Co. v. *Phillips*, 332 U.S. 168, 172-73 (1947).

The State of Minnesota is a sovereign government entrusted with constitutional responsibilities, among which is the role of protector of the rights of its citizens, particularly, we suggest, at those points where such rights intercept with the state's own activities such as those it undertakes in its role of tax collector. True fairness requires an appreciation and understanding, at that juncture, that the State of Minnesota and its taxpayers do not stand on equal footing and that if the role of tax collector is given unrestrained sway, the taxpayer has no protection except through costly litigation. Petitioner therefore urges this Court to define the unitary concept with greater accuracy and make clear that unitariness, to be a rationally applicable concept, must be seen in terms of revenue and expense, and the sources thereof, and not in terms of such superficial aspects as the taxpayer's organizational or ownership circumstances.

The Minnesota Supreme Court concluded that all of Powers' revenues came from Minnesota, but nevertheless upheld the applicability of apportionment. Petitioner seeks a remedy from this anomaly and requests that either a writ be issued or that summary direction be given to the Minnesota Supreme Court to revise its decision in accordance with the *Woolworth* precedent.

CONCLUSION

For the foregoing reasons, as well as those which have been urged in the petition, the petitioner's request should be granted.

Respectively submitted,

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